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Overlapping Norms in the EU Legal Order

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Abstract

In this thesis I draw attention to 'overlapping norms' as a distinct feature of EU law, show why EU lawyers should be concerned about how they inter-relate, and make the case for clearly articulated and consistently applied principles that govern their inter-relationship.

Norm overlap occurs when more than one norm could apply in a particular case and each of those norms is a variation on the same basic right, command, prescription or permission. As this thesis shows, norm overlap is prevalent in EU law as a result of three main factors: the highly substantive content of the Treaties, the close relationship between unwritten general principles of Union law and written sources of EU law, and the quality of legislative drafting. Despite the frequent occurrence of norm overlap in EU law, its existence has gone largely unacknowledged in legal scholarship. Similarly, so have the constitutional consequences that stem from how the ECJ determines the inter-relationship between overlapping norms.

Through a series of case studies, linked by the EU's commitment to protection against discrimination, I examine how the ECJ determines questions of priority between overlapping norms. Specifically, I test the role of basic priority principles – such as respect for express clauses and the principles of *lex superior*, *lex posterior* and *lex specialis* – in determining the inter-relationship between norms. Although under-discussed in the case law of the ECJ and EU legal scholarship, these priority principles provide a useful starting point against which to compare ECJ practice. Extensive doctrinal research leads to two important findings. First, the ECJ usually applies existing priority principles to determine the inter-relationship between overlapping norms, even though it does not tend to refer to these principles explicitly. Secondly, when the ECJ does depart from these priority principles, it is usually without proper justification and often negatively impacts upon legal certainty, institutional balance, the balance of powers between the EU and the Member States, and rights protection.

Declaration

I certify that this thesis I have presented for examination for the PhD degree of the University of Edinburgh is solely my own work. It has not been submitted for any other degree or professional qualification.

Emily Hancox

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Abbreviations

JOURNALS

AJIL	American Journal of International Law
BYIL	British Yearbook of International Law
CJEL	Columbia Journal of European Law
CJICL	Cambridge Journal of International and Comparative Law
CLJ	Cambridge Law Journal
CMLRev	Common Market Law Review
CYELP	Croatian Yearbook of European Law and Policy
CYELS	Cambridge Yearbook of European Legal Studies
EJIL	European Journal of International Law
EJLS	European Journal of Legal Studies
ELJ	European Law Journal
ELRev	European Law Review
ERPL	European Review of Private Law
EuConst	European Constitutional Law Review
EJSS	European Journal of Social Security
GLJ	German Law Journal
ILC	International Law Commission
ILJ	Industrial Law Journal
JCMS	Journal of Common Market Studies
MJ	Maastricht Journal of European and Comparative Law
MLR	Modern Law Review
NJIL	Nordic Journal of International Law
OJLS	Oxford Journal of Legal Studies
PL	Public Law
YEL	Yearbook of European Law

OTHER ABBREVIATIONS

AG	Advocate General
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EEC	European Economic Community
EU	European Union
ILO	International Labour Organisation
OJ	Official Journal of the European Union
TEU	Consolidated version of the Treaty on European Union
TFEU	Consolidated version of the Treaty on the Functioning of the European Union

Introduction

This thesis draws attention to 'overlapping norms' as a distinct feature of European Union (EU) law and the constitutional implications that stem from how the European Court of Justice (ECJ)[1] interprets their inter-relationship. Through several case studies, linked by the EU's commitment to protection against discrimination, this thesis shows the relevance of existing approaches to norm inter-relationship – respect for priority clauses and the principles of *lex superior*, *lex posterior* and *lex specialis* – in the context of norm overlap. Although rarely articulated by the ECJ, extensive case law analysis shows how ECJ practice is usually consistent with the application of these principles. Furthermore, where the ECJ departs from these principles there are often serious consequences for legal certainty, institutional balance, the balance of powers between the EU and the Member States, and rights protection.

1. THE CONCEPT OF OVERLAPPING NORMS

At the core of this thesis is the idea that norms of EU law can and do overlap. Overlap occurs when two or more provisions of EU law are *prima facie* applicable in a specific case.[2]

Norm overlap cuts across existing categories of norm inter-relationship that focus on the (ir)reconcilability of norms i.e. whether norms 'conflict' or 'accumulate'. The key concern is whether two or more norms could *apply* in a given situation rather than whether it is possible to *comply* with both. Each norm is thus likely to be a variation of the same basic right, command, prescription or permission. Norm overlap is a distinct method of classifying norms and, as explained more fully below, encompasses both

[1] The term ECJ is used in opposition to Court of Justice of the European Union (CJEU) which refers to the composite of '[t]he Court of Justice, the General Court and specialised courts' (Article 19(1) TEU).
[2] Norms are defined as legally valid (i.e. binding) provisions of EU law that are capable of application by the ECJ, see J Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (OUP 1993) 59. The definition of 'norm' adopted excludes competence norms as they do not raise questions of application. The subject matter of competence norms does sometimes coincide with both other competence norms (see e.g., Articles 19(1) and 157(3) TFEU) and other provisions of Union law (see e.g., Articles 45, 46 and 48 TFEU). For further discussion of competence norms, see: Chapter 1, Section 2.3, which discusses the coincidence between the free movement rules and Treaty provisions empowering the Union legislature to adopt measures to achieve free movement; and Chapter 3, Section 3.2, which discusses whether Article 52(2) CFR applies to competence norms. For additional analysis of the inter-relationship between competence norms, see G Conway, 'Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ' (2010) 11(9) *GLJ* 966.

conflicting norms and accumulating norms (an exhaustive categorisation of norm interaction developed by Pauwelyn).[3] To exemplify this point further, the following discussion considers when accumulating and conflicting norms will and will not overlap.

Norms accumulate when they 'add rights or obligations to already existing rights or obligations (without contradicting any of these rights or obligations)'.[4] Accumulation is a broad category; in our daily lives we comply with multiple accumulating norms and many of these will not overlap. For example, a norm requiring I switch the lights off when leaving a room will accumulate with another demanding I clean my teeth in the morning. No overlap arises between these norms given the distinct subject matter of each norm: no conflict, but no overlap either. Norms also accumulate where they address different parties. Consider a rule requiring I switch the lights off when leaving my office and another rule instructing the office manager to switch off any lights left on at the end of the day. The norms accumulate because it is possible for both actors to comply with them, but there is no overlap given the different scope *ratione personae.*

However, some accumulating norms will overlap. One such instance occurs when a norm simply 'confirm[s] already existing rights or obligations, without either adding to or detracting from these rights or obligations'.[5] As an example, consider a fire safety notice in an office and an office environmental policy that both require that I switch the lights off when I leave a room. An overlap exists since the latter norm replicates the obligation already found in the fire safety notice. Norms will also accumulate *and* overlap when one norm is an explicit exception to the other;[6] for example, a norm requiring that I switch the lights off when leaving a room will overlap with another norm that requires I switch the lights off when leaving the room *unless* an alarm sounds.

[3] According to Pauwelyn, '[i]f two norms do not conflict, they necessarily accumulate (and vice versa)', see J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (CUP 2003) 161. More recently Jeutner proposed the concept of a 'legal dilemma', see V Jeutner, *Irresolvable Norm Conflicts in International Law: The Concept of a Legal Dilemma* (OUP 2017).
[4] Pauwelyn (n 3) 161.
[5] Pauwelyn (n 3) 161.
[6] Pauwelyn (n 3) 163.

Conflicting norms will normally overlap. As a basic definition, norms conflict when one norm '*constitutes, has led to, or may lead to, a breach of the other*'.[7] This definition encompasses a range of circumstances including where one norm is a *non-explicit* exception to another. A norm requiring that I *always* turn off the light when I leave the room will both conflict with *and* overlap with a rule demanding I leave a room immediately when an alarm sounds.[8] Similar rights, prescriptions, permissions and commands that have varying parameters will also conflict and overlap. Taking one of Pauwelyn's examples, a conflict arises when one rule prescribes that on Saturdays I must jog 10 km in the park and another rule prescribes that on Saturdays I must jog 20 km in the park;[9] although I *can* satisfy both by running 20 km, 'compliance with the first norm (jogging 10 km) would mean violating the second (20 km).'[10] An overlap arises here since either norm could apply *prima facie*. Norms can also conflict and overlap when they are mutually exclusive. To take another of Pauwelyn's examples, one rule prescribing that on Saturdays at 8am I must be jogging in the park will overlap and conflict with another rule prescribing that at that very same time I must be working in my office.[11] The norms overlap since *prima facie* both prescribe what I should be doing on Saturday morning.

There is no need for overlapping norms to have the same source or hierarchical status; overlap occurs across different sources, but also between norms of the same source. In EU law, overlaps occur between:

- two or more norms of secondary law;[12]

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[7] Pauwelyn (n 3) 176 (emphasis in original), see also the discussion at 180-87. For other definitions of norm conflict see e.g. CW Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 *BYIL* 401, 451; H Hamner Hill, 'A Functional Taxonomy of Normative Conflict' (1987) 6(2) *Law and Philosophy* 227; W Czapliński and G Danilenko, 'Conflicts of Norms in International Law' (1990) 21 *Netherlands Yearbook of International Law* 3, 12; A Elhag, J Breuker and P Brouwer, 'On the Formal Analysis of Normative Conflicts' (2000) 9(3) *Information & Communications Technology Law* 207; E Vranes, 'The Definition of Norm Conflict in International Law and Legal Theory' (2006) 17(2) *EJIL* 395.

[8] To avoid confusion with accumulation, those norms will only conflict 'when the question of whether the two norms are in a "rule-exception" relationship is not explicitly regulated in either norm', see Pauwelyn (n 3) 183. Otherwise, the norms accumulate.

[9] Pauwelyn (n 3) 181.

[10] Pauwelyn (n 3) 181.

[11] Pauwelyn (n 3) 183.

[12] E.g. the rights of pregnant workers are protected by Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers who have recently given birth or are breastfeeding [1992] OJ L 348/1 and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/23.

- two or more Treaty provisions;[13]
- provisions of the Treaties and the Charter;[14]
- secondary law, general principles, the Charter and the Treaties;[15]
- secondary law and the Charter;[16]
- secondary law and Treaty provisions;[17]
- general principles and Treaty provisions;[18]
- general principles and the Charter;[19]
- general principles, Treaty provisions and the Charter;[20] and
- general principles, Treaty provisions and secondary legislation.[21]

As Chapter 1 will show, EU law is replete with norm overlaps.

2. MAIN RESEARCH QUESTION

This thesis centres around one core research question: how does the ECJ interpret the inter-relationship between overlapping norms of EU law?

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[13] E.g. the prohibition on nationality discrimination is found in Articles 18 and 45 TFEU.
[14] E.g. the right to vote and stand in municipal elections is found in Article 20(2)(b) TFEU and Article 40 CFR.
[15] E.g. the prohibition on discrimination on grounds of sex is given expression in Article 157(1) TFEU, Article 21(1) CFR, the general principle prohibiting discrimination on grounds of sex (recognised in Case 149/77 *Defrenne III* EU:C:1978:130) and Directive 2006/54.
[16] E.g. the right of employees to information and consultation is found in Article 27 CFR and Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community [2002] OJ 2002 L 80/29. The ECJ discussed the overlap between these two provisions in Case C-176/12 *Association de médiation sociale* EU:C:2014:2.
[17] E.g. rules on unfair competition are found in Article 101 TFEU and Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1.
[18] E.g. Article 13 TEU and the principle of institutional balance (recognised as a general principle in Case C-70/88 *Parliament v Council (Chernobyl)* EU:C:1990:217).
[19] E.g. the general principle of protecting human dignity (recognised by the ECJ in Case C-377/98 *Netherlands v Parliament and Council* EU:C:2001:523) and Article 1 CFR.
[20] E.g. the rules on the Union's liability for its actions in Article 340 TFEU and Article 41(3) CFR and as general principle of Union law (recognised in Joined Cases C-120/06 P and C-121/06 P *FIAMM and FIAMM Technologies v Council and Commission* EU:C:2008:476).
[21] E.g. the principle of proportionality is given expression in Article 5(4) TEU and Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376/36, Article 15(3)(c) and is a general principle of Union law (recognised in Case 114/76 *Bela-Mühle* EU:C:1977:96).

Prompting the decision to ask this question, and to examine the ECJ's approach to overlapping norms, were two linked observations. The first observation was to recognise the role played by differing expressions of the same right in several problematic ECJ cases and, in particular, the (then) recent ECJ decision in *Dano*.[22] At the heart of the complexities arising in the *Dano* case seemed to be the coincidence of four distinct rights to equal treatment found amongst primary and secondary Union law: Article 20 CFR, Article 18 TFEU, Directive 2004/38[23] and Regulation 883/2004.[24] The potential applicability of several distinct (yet similar) norms in the circumstances of the case was striking; how had this level of replication come about and what was the relationship between these provisions?

The second observation was that the *Dano* decision suggested a shift in how the ECJ approached the relationship between similar norms of primary and secondary law. In the earlier decisions of *Martínez Sala*[25] and *Trojani*,[26] the ECJ held that Union citizens could rely on the broad prohibition on nationality discrimination found in primary law outside of situations regulated by secondary Union law.[27] In contrast, the ECJ in *Dano* considered that 'a Union citizen can claim equal treatment with nationals of the host Member State *only if* his residence in the territory of the host Member State complies with the conditions [laid down in Union secondary law]'.[28] The effect of the decision was to treat the right to equal treatment in Union secondary law as exhaustive of the primary right, leading to the conclusion that the ECJ 'poured the content of the primary

[22] Case C-333/13 *Dano* EU:C:2014:2358.
[23] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77, Article 24.
[24] Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166/1, Article 4.
[25] Case C-85/96 *Martínez Sala* EU:C:1998:217.
[26] Case C-456/02 *Trojani* EU:C:2004:488.
[27] E.g. under Regulation 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ Spec Ed (II) 475 or Regulation 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ Spec Ed (II) 416.
[28] *Dano* (n 22), para. 69 (emphasis added). Although it does not alter the observation that a difference emerges in the ECJ's underlying approach, it should be noted that there were some differences between the *Martínez Sala* and *Trojani* cases and the decision in *Dano*. In particular, Miss Dano may not have met the conditions for lawful residence under German law and the legislative framework had changed, see further D Thym, 'When Union Citizens Turn into Illegal Migrants: The *Dano* Case' (2015) 40(2) *ELRev* 249.

right to equal treatment into a statement in secondary law.'[29] Again, this shift in approach sparked several questions; what about the principle of *lex superior*? Is Union secondary law able to determine the limits of the Treaties and, if so, in which situations? What are the constraints on how the ECJ interprets the relationship between norms? Despite extensive critique of the *Dano* decision in EU scholarship,[30] the ECJ's approach to the relationship between norms received relatively little attention.

These two linked observations – the existence of several similar provisions and the departure from expected principles – triggered an investigation into the existence of overlapping norms and the principles determining priority between them. During this study what became apparent was not only the scale of norm overlap but also how the ECJ's approach usually concurred with that suggested by the classical principles of norm inter-relationship, i.e. the principles of *lex superior*, *lex posterior* and *lex specialis* (which accord priority to the norm which is hierarchically superior, later in time or more specific respectively). However, as returned to below, these priority principles receive scant discussion by the ECJ.

The large numbers of norm overlaps, combined with an under-theorisation of how the ECJ should resolve them, sits uncomfortably with the potential effects of the ECJ's approach. As *Dano* itself shows, how the ECJ resolves questions of norm inter-relationship is not simply a theoretical issue, but can alter the outcome of a given case; arguably, the ECJ's approach to norm inter-relationship lay at the very heart of the decision to deny Ms Dano certain social benefits. How the ECJ interprets the inter-relationship between overlapping norms of EU law is, therefore, a question with very real practical relevance.

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[29] N Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52(4) *CMLRev* 889, 909.

[30] E.g. H Verschueren, 'Preventing "Benefit Tourism" in the EU: A Narrow or Broad Unterpretation of the Possibilities Offered by the ECJ in *Dano*?' (2015) 52(2) *CMLRev* 363; Thym (n 28); M Cousins, 'Case Comment on *Dano*' (2015) 22(2) *Journal of Social Security Law* 95; N Nic Shuibhne, '"What I Tell You Three Times is True" Lawful Residence and Equal Treatment after Dano' (2016) 23(6) *MJ* 908; C O'Brien, '*Civis Capitalist Sum*: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53(4) *CMLRev* 937.

3. RELATIONSHIP TO EXISTING LITERATURE

By examining the ECJ's approach to the inter-relationship between overlapping norms, this thesis makes **three contributions** to existing literature:

- **conceptual:** developing the notion of norm overlap, which can include but can also differ from norm conflict;
- **substantive**: demonstrating how principles of interpretation that exist for national and international law are surprisingly under-discussed for EU law, but actually bring utility, even if partly modified, for the inter-relationship between overlapping norms of EU law; and
- **empirical**: systematically analysing the ECJ's approach to norm overlap in a manner not previously attempted and showing that, despite the lack of clear articulation, ECJ practice is largely consistent with basic priority principles. Furthermore, when the ECJ departs from these principles, this often results in negative constitutional consequences.

These points will now be explained in more detail.

First, this thesis adds to existing literature by drawing attention to the prevalence of and the complexity created by overlapping norms in EU law. The closest that existing scholarship comes to recognising norm overlap as a distinct concept is the notion of 'multi-sourced equivalent norms' developed by Broude and Shany in the context of international law. Introducing their edited collection, they describe multi-sourced equivalent norms as:

> … "equivalent" because … they are not always identical, and an understanding of their interrelationship requires deeper study. They are "multi-sourced" because … equivalent international norms are rarely conjoined like the analogous parts of a verse. Rather, equivalence is found between distant sources of international law, and across fields of international law that otherwise might have little in common with each other. Furthermore, normative parallelism often exists unnoticed and unacknowledged, although pregnant with problems of law and policy, that lie dormant until unexpected contexts and unintended developments bring them to the fore.[31]

[31] T Broude and Y Shany, 'The International Law and Policy of Multi-Sourced Equivalent Norms' in T Broude and Y Shany (eds), *Mutli-Sourced Equivalent Norms in International Law* (Hart 2011) 1-15, 2.

This thesis owes an important theoretical debt to their work; the definition of norm overlap and its significance builds on the idea of equivalent norms and their contention that even subtle differences between norms can lead to complex questions of norm inter-relationship.

The specific studies into multi-sourced equivalent norms included within Broude and Shany's edited collection are, however, only of limited relevance. What underpins the different contributions is the fragmentation of international law resulting from the emergence of specialised and/or self-contained regimes regulating different subject areas. As Koskenniemi notes:

> What once appeared to be governed by "general international law" has become the field of operation for such specialist systems as "trade law", "human rights law", "environmental law", "law of the sea", "European law" and even such exotic and highly specialized knowledges as "investment law" or "international refugee law" etc. – each possessing their own principles and institutions.[32]

Broude and Shany's work addresses the questions that arise when different specialised systems include broadly similar norms. In contrast, this thesis deals with only one legal system – that of the EU – and so problems of multiple regimes and of selectivity between regimes do not arise.[33]

In the context of EU law, several scholars touch upon the idea of norm overlap as and when overlaps arise in practice. However, existing analyses tend to be piecemeal in nature and do not recognise norm overlap as a recurring feature of Union law. For example, Lenaerts and De Smijter, Arnull, Craig and Rossi all highlight the 'replication' of and 'overlap' between some Treaty rights in the Charter.[34] However, their recognition of one challenge presented by norm overlap – i.e. how the Charter should inter-relate

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[32] ILC, 'Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law'* (13 April 2006) UN Doc A/CN.4/L.682 ('Fragmentation Report'), para. 8.

[33] This thesis does not examine interactions between EU law and overlapping norms of national and international law. For example, in the UK, an overlap exists between the principle of equal pay set out in Article 157 TFEU, ILO Convention No 100 on Equal Remuneration for Men and Women Workers for Work of Equal Value (adopted 29 June 1951, entered into force 23 May 1953) 165 UNTS 303 and the Equality Act 2010.

[34] K Lenaerts and E de Smijter, 'A "Bill of Rights" for the European Union' (2001) 38 *CMLRev* 273, 282; A Arnull, 'From Charter to Constitution and Beyond: Fundamental Rights in the new European Union' [2003] *PL* 774, 778; P Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (OUP 2011) 232; LS Rossi, 'Same Legal Value as the Treaties: Rank, Primacy, and Direct Effects of the EU Charter of Fundamental Rights' (2017) 18(4) *GLJ* 771, 775.

with similar provisions in the Treaties – forms part of more wide-ranging discussions about the Charter and fundamental rights protection and not questions of norm inter-relationship. Similarly, Semmelmann, Hofmann and Mihaescu and Gualco all discuss the codification of general principles and the resulting 'overlap' between general principles and written expressions in the Charter and secondary Union law;[35] and the existence of different primary and secondary law instruments prohibiting nationality discrimination has recently gained increased scholarly attention.[36] Each of these contributions focuses on one specific issue and does not recognise broader questions stemming from norm overlap. This thesis fills this theoretical void by explicitly highlighting norm overlap as a distinct concept of Union law.

The second contribution made by this thesis is to fill a gap in existing literature on the role of priority principles in EU law and in the reasoning of the ECJ. While there is extensive scholarship on norm inter-relationship, existing literature mostly addresses the issue of norm conflicts in international law.[37] At present, very little EU legal scholarship

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[35] C Semmelmann, 'General Principles in EU Law between a Compensatory Role and an Intrinsic Value' (2013) 19(4) *ELJ* 458, 464; HH Hofmann and BC Mihaescu, 'The Relation between the Charter's Fundamental Rights and the Unwritten General Principles: Good Administration as the Test Case' (2013) 9 *EuConst* 73, 77; E Gualco, *General Principles of EU Law as a Passe-Partout Key within the Constitutional Edifice of the European Union: Are the Benefits Worth the Side Effects?* (2016) Birmingham Law School Institute of European Law Working Paper No. 5.

[36] E.g. H Verschueren, 'Free Movement of Persons in the European Union and Social Rights: An Area of Conflicting Secondary Law Instruments?' (2011) 12(2) *ERA Forum* 287; Nic Shuibhne, 'Limits Rising, Duties Ascending' (n 29); C O'Brien, 'The ECJ Sacrifices EU Citizenship in Vain: *Commission v United Kingdom*' (2017) 54(1) *CMLRev* 209; N Nic Shuibhne, 'Integrating Union Citizenship and the Charter of Fundamental Rights' in D Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart 2017) 209-240; A McDonnell, 'Equality for Citizens in the EU: Where Did All the Flowers Go?' in LS Rossi and F Casolari (eds), *The Principle of Equality in EU Law* (Springer 2017) 199-228.

[37] See e.g. Jenks (n 7); N Bobbio, 'Des critères pour résoudre les antinomies' (1964) 18(1/4) *Dialectica* 237; M Akehurst, 'The Hierarchy of the Sources of International Law' (1976) 47(1) *BYIL* 273; Czapliński and Danilenko (n 7); JB Mus, 'Conflicts between Treaties in International Law' (1998) 45(2) *Netherlands International Law Review* 208; G Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions' (2001) 35(6) *Journal of World Trade* 1081; Pauwelyn (n 3); A Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*' (2005) 74(1) *NJIL* 27; Vranes (n 7); D Shelton, 'Normative Hierarchy in International Law' (2006) 100(2) *AJIL* 291; ILC, 'Fragmentation Report' (n 32); N Prud'homme, '*Lex Specialis*: Oversimplifying A More Complex and Multifaceted Relationship?' (2007) 40(02) *Israel Law Review* 356; WA Schabas, '*Lex Specialis*? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of *Jus ad Bellum*' (2007) 40(2) *Israel Law Review* 592; M Milanovic, 'Norm Conflict in International Law: Whither Human Rights' (2009) 20 *Duke Journal of Comparative & International Law* 69; R Michaels and J Pauwelyn, 'Conflict of Norms or Conflict of Laws: Different Techniques in the Fragmentation of Public International Law' (2011-2012) 22(3) *Duke Journal of Comparative & International Law* 349; CJ Borgen, 'Treaty Conflicts and Normative Fragmentation' in DB Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 448-471; J Vidmar, 'Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?' in E de Wet and J Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (OUP 2012); D Pulkowski,

addresses the role of priority principles in the EU legal system. The site of existing discussion is within broader discourses on the ECJ's legal reasoning[38] or efforts to theorise the hierarchy of norms in the EU.[39]

The conclusions reached in relation to international law on the meaning and appropriate use of priority principles, cannot be directly transposed to the EU context on account of its *sui generis* nature.[40] Although the EU is an international organisation, founded on the basis of a Treaty between Member States, the EU legal order differs from international regimes: there is a hierarchy between norms (with the Treaties akin to a constitutional text), a legislature (albeit variously constituted), and a centralised judiciary. The ECJ itself repeatedly affirms this point, stating that the EU:

> … is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the [EU] Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions.[41]

The EU legal order is not directly comparable to a domestic regime either. In contrast to the written constitutions of most of the Member States, the EU's constitutional text is far more substantive and includes policy goals such as free movement. Furthermore, when compared to states, the EU lacks democratic legitimacy.[42] By discussing the role of

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The Law and Politics of International Regime Conflict (OUP 2014) 13-42; D Shelton, 'International Law and "Relative Normativity"' in MD Evans (ed), *International law* (4th edn, OUP 2014) 138-165; Jeutner (n 3).

[38] See e.g. Bengoetxea (n 2); G Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2012); G Conway, *The Limits of Legal Reasoning and the European Court of Justice* (CUP 2012).

[39] F Dowrick, 'A Model of the European Communities' Legal System' (1983) 3(1) *YEL* 169; R Bieber and I Salome, 'Hierarchy of Norms in European Law' (1996) 33(5) *CMLRev* 907; Craig, *The Lisbon Treaty* (n 34) 57-66; H Hofmann, 'Legislation, Delegation and Dmplementation Under the Treaty of Lisbon: Typology Meets Reality' (2009) 15(4) *ELJ* 482; J Ziller, 'Hierarchy of Norms: Hierarchy of Sources and General Principles In European Union Law' in U Becker and others (eds), *Verfassung und Verwaltung in Europa Festschrift für Jürgen Schwarze zum 70. Geburtstag* (Nomos Verlagsgesellschaft 2014) 334-352; D Curtin and T Manucharyan, 'Legal Acts and Hierarchy of Norms in EU Law' in D Chalmers and A Arnull (eds), *The Oxford Handbook of European Union Law* (OUP 2015) 103-125.

[40] On the nature of the EU, see e.g. B de Witte, 'The European Union as an International Legal Experiment' in G de Búrca and J Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2011) 19-56; W Phelan, 'What Is Sui Generis About the European Union? Costly International Cooperation in a Self-Contained Regime' (2012) 14(3) *International Studies Review* 367; J Klabbers, 'Sui Generis? The European Union as an International Organization' in D Patterson and A Södersten (eds), *A Companion to European Union Law and International Law* (Wiley-Blackwell 2016) 3-15.

[41] Joined Cases C-402/05 P and C-415/05 P *Kadi v Council and Commission* EU:C:2008:461, para. 281. See also, Opinion 1/91 *Re the EEA Agreement* EU:C:1991:490, para. 21.

[42] See e.g. G Majone, 'Europe's "Democratic Deficit": The Question of Standards' (1998) 4(1) *ELJ* 5; A Follesdal and S Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44(3) *JCMS* 533; A José Menéndez, 'The European Democratic Challenge: The Forging of a Supranational Volonté Générale' (2009) 15(3) *ELJ* 277; VA Schmidt, 'Democracy and

priority principles in the context of EU law, this thesis fills a lacuna in existing scholarship.

The third contribution made by this this thesis is to build upon existing piecemeal analyses of norm inter-relationship in EU law by providing a wide-ranging survey of the ECJ's approach to the inter-relationship between overlapping norms. Most existing doctrinal analyses of norm inter-relationship in EU law do not address the relevance of priority principles but instead tend to focus on the outcome of the ECJ's approach. For example, Hofmann and Mihaescu appraise the inter-relationship between the Charter and general principles from the perspective of achieving maximum rights protection.[43] Taking a distinct approach, Syrpis and Davies both analyse the ECJ's approach to the inter-relationship between primary and secondary Union law from the perspective of institutional balance.[44] Verschueren discusses the inter-relationship between secondary norms in the field of nationality discrimination, but positions his analysis within a broader critique of Union citizenship.[45] This thesis differs from these existing contributions by focusing on the question of what principles determine the inter-relationship between norms rather than on the impact of applying those principles.

Only one article by Semmelmann in the *European Law Journal* comes close to the analysis carried out by this thesis. She examines the continuing role of general principles once codified and offers an initial categorisation of the case law according to the approaches the ECJ might take to the relationship between general principles and overlapping written sources.[46] However, her analysis, only focuses on one kind of overlap and largely concerns the contested status of general principles. Her contribution leaves considerable space for a more systematic analysis of the inter-relationship between overlapping norms. As she herself admits, '[t]he role of and the interaction between the various

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Legitimacy in the European Union Revisited: Input, Output and "Throughput"' (2013) 61(1) *Political Studies* 2.

[43] Hofmann and Mihaescu (n 35) 82.

[44] G Davies, 'Legislative Control of the European Court of Justice' (2014) 51(6) *CMLRev* 1579; P Syrpis, 'The Relationship between Primary and Secondary Law in the EU' (2015) 52(2) *CMLRev* 461.

[45] H Verschueren, 'The Relationship between Regulation (EEC) 1612/68 and Regulation (EEC) 1408/71 Analysed through ECJ Case Law on Frontier Workers' (2004) 6 *EJSS* 7; Verschueren, 'Free Movement of Persons in the European Union and Social Rights' (n 35); H Verschueren, 'Free Movement of EU Citizens: Including for the Poor' (2015) 22(1) *MJ* 10.

[46] Semmelmann (n 35).

sources, in particular in the area of equal treatment, are highly complex and ask for rules that either prioritise the various sources or govern their interaction otherwise.'[47] This thesis takes her research further, by assessing what rules do – in practice – govern the interaction between overlapping norms.

4. THE CASE STUDY

It would be impossible to examine, within the confines of a doctoral thesis, the question of how norms do and ought to overlap across the entirety of EU law. This thesis therefore restricts the framework of analysis to the prohibition on discrimination in EU law, which provides a broad backdrop to the whole thesis. Each chapter focuses on a different prohibited ground of discrimination to allow for an in-depth discussion of how the ECJ resolves questions of norm overlap.

A distinction should be drawn between the prohibition on discrimination – the case study adopted – and the wider notion of equality. This thesis examines the development of overlaps between norms which prevent '[EU] and national authorities from imposing differential treatment without good reason.'[48] Excluded are norms enshrining the principle of equality in a wider sense tied to more substantive notions of the social good,[49] this includes overlaps between norms of Union law requiring positive action to secure equality such as Articles 23 and 26 CFR and Article 157(4) TFEU.

The reasons for selecting non-discrimination as a case study are twofold. First, non-discrimination norms expand across a wide cross-section of EU law due to the different roles played by the prohibition on discrimination throughout the EU's history.[50]

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[47] Semmelmann (n 35) 466.
[48] T Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006) 62.
[49] N Bamforth, 'Sexual Orientation Discrimination after *Grant v South-West Trains*' (2000) 63(5) *MLR* 694, 710. Barnard argued that the EU was moving towards a substantive principle of equality after Case C-13/94 *P v S* EU:C:1996:170 (C Barnard, 'The Principle of Equality in the Community Context: *P, Grant, Kalanke* and *Marschall*: Four Uneasy Bedfellows?' (1998) 57(2) *CLJ* 352, 360). Tridimas questions, however, whether the EU could protect a substantive notion of equality, see Tridimas (n 48) 62.
[50] On the different roles played by the prohibition on discrimination in Union law, see e.g. C Barnard, 'The Economic Objectives of Article 119' in TK Hervey and D O'Keeffe (eds), *Sex Equality Law in the European Union* (Wiley 1996) 321-34; G de Búrca, 'The Role of Equality in European Community Law' in A Dashwood and S O'Leary (eds), *The Principle of Equal Treatment in EC Law* (Sweet & Maxwell 1997); G More, 'The Principle of Equal Treatment: From Market Unifier to Fundamental Right?' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (1st edn, OUP 1999) 517-553, 518.

Removing nationality discrimination was instrumental in securing the common market; as a consequence, prohibiting nationality discrimination are several directly effective Treaty provisions[51] and secondary law measures aiming to give effect to those provisions.[52] The principle of non-discrimination later took on a additional role as an autonomous 'constitutional' right; the adoption of additional legislative bases and express commitments to equal treatment at Amsterdam spurred on this development. In the process of this transformation in the principle of equal treatment – from an instrumental and economic principle to a fundamental right – the Union legislature adopted several additional non-discrimination measures, which must then interact with the prohibitions on discrimination found in general principles and later enshrined in the EU Charter of Fundamental Rights.[53]

The second reason for selecting non-discrimination as a case study is because of its aforementioned status as a fundamental right. How overlapping norms inter-relate can affect the outcome of ECJ decisions and so the use of non-discrimination as a lens adds salience to the discussion due to its importance in securing the participation of disadvantaged groups and minorities in the workplace and beyond.[54] Furthermore, the prohibition on discrimination is of express importance to the EU polity; Article 2 TEU states that '[t]he Union is founded on the values of respect for … equality' while Article 10 TEU provides that '[i]n defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'[55] Adopting non-discrimination as a case study enhances, therefore, the practical importance of the findings set out in this thesis since how overlapping norms inter-relate can affect individual rights.

The fundamental importance of the principle of non-discrimination also means that cases involving discrimination claims often attract considerable comment in the academic literature.[56] Much of this literature focuses on the *outcome* of the case: does the

[51] Articles 18, 34, 35, 45, 49, 56, 63, 157 TFEU.
[52] E.g. Directive 2006/54; Regulation 883/2004; Regulation 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141/1.
[53] An in-depth exposition of overlapping norms prohibiting discrimination is provided in Chapter 1.
[54] On access to services, see e.g. Case C-83/14 *CHEZ Razpredelenie Bulgaria* EU:C:2015:480.
[55] See also Articles 3(3) and 8 TEU and Article 157 TFEU.
[56] For recent discussions, see e.g. C Kilpatrick, 'Non-Discrimination' in S Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 579-604; C O'Cinneide, 'The Constitutionalization

ECJ sufficiently protect the rights of disadvantaged groups or not? In choosing non-discrimination as a case study, this thesis offers a broader perspective on non-discrimination and offers an added value perspective to the existing literature.

5. A NOTE ON METHODOLOGY

This thesis employs a doctrinal methodology. The choice of methodology reflects the responsibility of the ECJ – alongside national courts tasked with interpreting Union law – for resolving questions of norms inter-relationship.[57]

Analysing ECJ case law has two advantages. First, it demonstrates the practical import of how norms overlap. Inconsistencies in how the ECJ resolves cases, as well as the implications that then flow, become clear. Examining ECJ case law shows the consequences of how norms inter-relate for rights protection, institutional balance, legal certainty and the scope of Union law. Furthermore, the constitutional implications of ECJ decisions in turn justify the attention placed on interpretative principles[58] rather than advocating e.g. wholesale reform of Union law-making processes. However, the analysis does raise questions about the quality of EU legislation, which will be highlighted where relevant.

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of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' 22(3) *MJ* 370; E Muir, 'Pursuing Equality in the EU' in D Chalmers and A Arnull (eds), *The Oxford Handbook of European Union Law* (OUP 2015) 919-941; D O'Dempsey, 'Age Discrimination in the light of CJEU Case Law' (2016)(1) *European Equality Law Review* 22; Rt Uitz, 'The Old Wine and the New Cask: The Implications of the Charter of Fundamental Rights for European Non-Discrimination Law' (2016)(3) *European Anti-Discrimination Law Review* 24; G de Beco, 'Is Obesity a Disability: The Definition of Disability by the Court of Justice of the European Union and Its Consequences for the Application of EU Anti-Discrimination Law' (2016) 22(2) *Columbia Journal European Law* 381; N Jääskinen, 'Discrimination on Grounds of Obesity' in S Vogenauer and S Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart 2017) 355-364; A Tryfonidou, 'Discrimination on the Grounds of Sexual Orientation and Gender Identity' in S Vogenauer and S Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart 2017) 365-394; J Mulder, *EU Non-Discrimination Law in the Courts: Approaches to Sex and Sexualities Discrimination in EU Law* (Hart 2017).

[57] As follows from Article 19(1) TEU. It is widely acknowledged that the ECJ is the institution responsible for determining interactions between norms. For instance, when discussing the impact of the entry into force of the Charter, Hofmann and Mihaescu note that the 'existing Treaty has left this question [of what role general principles continue to play] very much to the Court', see Hofmann and Mihaescu (n 35) 74.

[58] For a similar argument in the context of subsidiarity, see e.g. G de Búrca, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor' (1998) 36(2) *JCMS* 217; T Horsley, 'Reflections on the Role of the Court of Justice as the "Motor" of European Integration: Legal Limits to Judicial Lawmaking' (2013) 50(4) *CMLRev* 931.

Secondly, considering how the ECJ approaches overlapping norms makes it possible to identify the role played by existing approaches in practice. Focusing on ECJ case law allows for the identification of interpretative principles that the ECJ respects even if only implicitly.

6. THESIS OUTLINE

This thesis contains six substantive Chapters.

Chapter 1 outlines the development of overlapping norms prohibiting discrimination. Taking a chronological approach to the development of EU law, the Chapter shows the sheer number of overlaps that have accrued in the area of non-discrimination alone. The Chapter demonstrates that the responsibility for creating overlaps does not lie wholly with any one of the three main avenues of norm development (i.e., judicial interpretation, the adoption of secondary law or Treaty amendment). Instead, this Chapter argues that there are three main factors behind the build-up of overlapping norms: first, the highly substantive nature of EU primary law that is often directly enforceable in the Member States; secondly, the use of written norms as inspirational sources for the development of unwritten general principles of Union law; and, thirdly, the poor quality of legislative drafting.

Chapter 2 starts with the existence of norm overlaps and explains why EU lawyers should be concerned about the inter-relationship between overlapping norms. The Chapter demonstrates how the ECJ's approach to norm inter-relationship can affect the outcome of proceedings due to (even small) differences between largely similar norms relating e.g. to their content, capacity for direct effect or hierarchical status. However, different modes of interaction between overlapping norms can also have more serious constitutional implications; this Chapter sheds light on the possible consequences for the protection of fundamental rights, the principle of institutional balance, the balance of powers between the EU and its Member States, and the principle of legal certainty. Having underscored the importance of the ECJ's approach to the inter-relationship between overlapping norms, the Chapter then turns to assess the guidance offered to the ECJ here by existing legal tools and principles concerning norm inter-relationship. Specifically, this Chapter examines the potential role of priority clauses and the

principles of *lex superior, lex specialis* and *lex posterior* in structuring the inter-relationship between overlapping norms. The contention is that these principles, in theory, offer workable and normatively justified guidance to the ECJ when resolving questions of norm inter-relationship.

Chapters 3-6 assess whether ECJ case law coheres in practice with the priority clauses and priority principles outlined in Chapter 2. Each Chapter uses a different specific overlap as a testing ground and adopts a similar structure. After setting out the case study adopted, each Chapter then considers (hypothetically) the guidance offered by either a relevant priority clause or (one of) the principles of *lex superior, lex specialis* and *lex posterior* in that specific context. This forms a baseline against which to compare ECJ practice. The focus is not on what principles the ECJ expressly purports to be relying upon; the ECJ's terse reasoning style would make such an exercise futile. Instead, each Chapter looks to how – more practically – the ECJ prioritises overlapping norms.

Chapter 3 addresses the inter-relationship between overlapping norms of primary and secondary law where there is a hierarchy between norms. Using the prohibition on discrimination of grounds of sex as a case study, this Chapter analyses the inter-relationship between Article 157 TFEU and overlapping secondary law and Article 21(1) CFR and overlapping secondary norms prohibiting sex discrimination. This Chapter tests whether ECJ case law coheres with respect for the principle of *lex superior* and whether the *lex superior* principle works well in the context of norm overlap. The conclusion reached is that, although that case law complies with the principle of *lex superior*, this principle requires some modification for the context of EU law and norm overlap.

Chapter 4 turns to assess the ECJ's approach to the inter-relationship between overlapping norms of primary law and, specifically, how the ECJ approaches priority clauses. The Chapter looks at how the ECJ resolves the inter-relationship between different Treaty provisions prohibiting discrimination on grounds of nationality (i.e. between Article 18 TFEU and Articles 34, 45, 49, 56, 63 TFEU) and between those Treaty provisions and Article 21(2) CFR. Characterising these different overlaps are express priority clauses – located in Article 18 TFEU and in Article 52(2) CFR – that

mediate the inter-relationship between overlapping Treaty norms and between the Treaties and the Charter. The main finding here is that ECJ practice is almost always consistent with the understanding of priority clauses articulated by this thesis.

Chapter 5 considers how the ECJ interprets the relationship between overlapping secondary norms. To test the ECJ's approach to norm inter-relationship when a priority clause does not fully determine norm interactions, this Chapter focuses on the prohibition on nationality discrimination as it relates to Union citizens seeking equal access to social benefits in a host Member State. ECJ practice is assessed for its compatibility with priority clauses and the principles of *lex specialis* and *lex posterior*. The main finding is that, where there is a priority clause, the ECJ almost always respects the guidance offered by that clause. In the absence of a priority clause, the Chapter argues that that *lex specialis* principle offers a workable system for prioritising between overlapping norms of secondary law. However, the ECJ does not expressly refer to that principle and the ECJ does not always prioritise the *lex specialis*.

Chapter 6 considers the continuing role of general principles following the entry into force of the EU Charter of Fundamental Rights. In contrast to other Chapters it is not obvious which priority clause or principle might guide the ECJ here. None of the horizontal provisions in the Charter addresses its relationship to overlapping general principles. Furthermore, the unwritten nature of general principles leads to uncertainty over their status, rank and 'date of birth' making it difficult to apply, in turn, the principles of *lex superior, lex posterior* and *lex specialis*. It is argued, however, that the Charter can be understood as a *lex specialis* in relation to overlapping general principles on account of its constitutional significance and overarching aim to *replace* general principles by putting them on a written footing. To test the ECJ's approach in practice this Chapter uses the prohibition on status discrimination (e.g. on grounds of age, sex, sexual orientation etc.) as a case study. Overall, ECJ practice coheres with this understanding although greater clarity over the continuing role of general principles would be welcome.

In the end this thesis reaches three main conclusions. First, norm overlap is a recurrent phenomenon in EU law and raises distinct questions due to the similarities and

connections between overlapping norms. Secondly, the ECJ rarely articulates the principles or rules governing norm interactions, which can lead to inconsistent outcomes and resulting legal uncertainty. Thirdly, existing approaches to norm inter-relationship i.e. respecting priority clauses and the principles of *lex superior, lex specialis* and *lex posterior* often offer workable guidance upon which– in practice – the ECJ often impliedly relies. Were the ECJ to articulate these principles clearly and to apply them consistently, the doctrinal analysis carried out by this thesis suggests this would qualitatively improve the resolution of norm overlaps. Overall, the significance of how overlapping norms inter-relate – as borne out by the individual case studies – requires guiding principles that focus our attention on the justifications for prioritising norms. A key finding is that existing approaches to norm inter-relationship already provide a system of norm inter-relationship that balances constitutional values in hard cases. However, the ECJ does not always rigorously adhere to this approach (and sometimes falls prey to more political considerations).

Chapter One

The Development of Norm Overlaps

1. INTRODUCTION

What is the scale of norm overlap in the EU and what are the main drivers that lead to its existence? There would be little point devoting an entire thesis to a rare phenomenon and so this opening Chapter demonstrates the prevalence of norm overlap in the EU legal system. This Chapter also shows the responsibility of several actors in creating norm overlaps, which in turn makes their removal and prevention difficult.

This Chapter takes a chronological approach to the development of overlapping norms in the field of non-discrimination, setting out the factors behind the proliferation of norm overlaps across four different phases of the EU's history. Phase I shows the development of overlaps from the entry into force of the Treaty of Rome until just before the Treaty of Maastricht. Most overlaps in this Phase stemmed from the recognition that several Treaty provisions are directly effective and the existence of secondary law alongside these provisions. Phase II starts with the adoption of the Maastricht Treaty and continues until the 'solemn proclamation' of the EU Charter of Fundamental Rights. In this Phase, several constitutional changes – such as the creation of Union citizenship and the addition of legislative bases to promote equal treatment within the EU – laid the groundwork for future overlaps. Phase III continues from 2001 until just before the Lisbon Treaty entered into force. Creating overlaps during this Phase were attempts by the Union legislature to consolidate and recast existing legislation in the fields of nationality and sex discrimination as well as an increased role for general principles. Phase IV extends from the entry into force of the Lisbon Treaty to the present day. The key development addressed here is the entry into force of the Charter. The Chapter concludes that, in summary, there are three main drivers of overlap: (1) the unusually substantive nature of EU primary law; (2) the codification of general principles in, and their extrapolation from, written sources of Union law; and (3) poor legislative drafting.

While aiming to be as comprehensive as possible, this Chapter necessarily simplifies certain aspects of EU non-discrimination law. By focusing on the bigger picture, rather than on the minutiae of each norm prohibiting discrimination, the Chapter shows the sheer number of overlaps that have accrued. In doing so, this Chapter sets the scene for the remainder of the thesis and provides a backdrop for the more detailed discussion in later chapters. The Chapter does not attempt to evaluate the EU's substantive policy choices relating to the protection of equal treatment, which receive extensive discussion elsewhere.[1] For simplicity, this Chapter uses current Treaty numbering and refers to previous versions only where necessary, e.g. because of previously different wording for amended Treaty provisions.

2. PHASE I: 1957-1990

2.1. Non-Discrimination and the Treaty of Rome

Phase I charts the development of overlaps between norms prohibiting discrimination from the founding EEC Treaty until 1990. The Treaty of Rome included prohibitions on discrimination on three distinct grounds: first, a prohibition on discrimination on grounds of nationality (Articles 18, 34, 35, 45, 49, 56 and 63(1) TFEU); secondly, a prohibition on discrimination on grounds of sex specifically as regards pay (Article 157 TFEU); and, thirdly, a prohibition on discrimination between producers and consumers in the context of agriculture (Article 40(2) TFEU). These prohibitions on discrimination in the Treaty of Rome still form part of the EU Treaties, albeit in an amended form. Most overlaps accrued in the fields of nationality and sex discrimination; however, it is worth beginning the discussion by mentioning Article 40(2) TFEU. The inspirational role played by Article 40(2) TFEU led to the development of a general principle of equality that underscores each of the overlaps outlined below.

[1] There is already an abundance of literature on this, see e.g. C McCrudden (ed), *Women, Employment and European Equality Law* (Eclipse 1987); S Fredman, 'European Community Discrimination Law: A Critique' (1992) 21(2) *ILJ* 119; H Fenwick and TK Hervey, 'Sex Equality in the Single Market: New Directions for the European Court of Justice' (1995) 32(2) *CMLRev* 443; M Bell, *Anti-Discrimination Law and the European Union* (OUP 2002); TK Hervey, 'Thirty Years of EU Sex Equality Law: Looking Backwards, Looking Forwards' (2005) 12(4) *MJ* 307; M Bell, *Racism and Equality in the European Union* (OUP 2009); J Mulder, *EU Non-Discrimination Law in the Courts: Approaches to Sex and Sexualities Discrimination in EU Law* (Hart 2017); LS Rossi and F Casolari (eds), *The Principle of Equality in EU Law* (Springer 2017).

2.2. Extrapolating a General Principle of Equality

According to Article 40(2) TFEU (ex Article 40(3) EEC), the organisation of agricultural markets 'shall exclude any discrimination between producers or consumers within the Union.'[2] Early on, the ECJ recognised Article 40(2) TFEU as a specific written expression of a potentially far-reaching general principle of equality. In *Ruckdeschel*,[3] the ECJ held that:

> … the prohibition of discrimination laid down in [Article 40(2) TFEU] is merely a specific enunciation of the general principle of equality which is one of the fundamental provisions of [EU] law. This principle requires that similar situations shall not be treated differently unless the differentiation is objectively justified.[4]

This was a significant development; the general principle of equal treatment underlies all the non-discrimination norms discussed throughout this thesis. The ECJ's decision in *Ruckdeschel* also provides an early illustration of one of the reasons why norm overlap exists, i.e. the ECJ derives 'autonomous' general principles from written sources of Union law. The ECJ must then determine how those general principles interact with overlapping written expressions.

Discussion now turns to outline the more detailed non-discrimination rules found in the Treaty of Rome prohibiting nationality discrimination and requiring equal pay.

2.3. The Development of Overlapping Norms Prohibiting Nationality Discrimination

Central to achieving the common market[5] was the abolition of a 'host of discriminatory rules and practices whereby the national governments traditionally protected their own producers and workers from foreign competition.'[6] To excise protectionism and create an integrated European market, the Treaty set out a series of free movement rights and empowered the Union legislature to act to remove obstacles to intra-EU movement.

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[2] On this provision, see e.g. Joined Cases 7/54 and 9/54 *Ind. sidé. luxembourgeoises v High Authority* EU:C:1956:2; Case 8/55 *Fédération charbonnière de Belgique v High Authority* EU:C:1956:11.
[3] Joined Cases 117/76 and 16/77 *Ruckdeschel* EU:C:1977:160.
[4] *Ruckdeschel* (n 3), para. 7. See also e.g. Case 103/77 *Royal Scholten-Honig* EU:C:1978:186, para. 26; Case 138/79 *Roquette v Council* EU:C:1980:249, para. 6; Case 139/79 *Maizena v Council* EU:C:1980:250, para. 6.
[5] Article 2 EEC referred to the EEC's aim of 'establishing a Common Market and progressively approximating the economic policies of Member States'.
[6] F Jacobs, 'An Introduction to the General Principle of Equality in EC Law' in A Dashwood and S O'Leary (eds), *The Principle of Equal Treatment in EC Law* (Sweet & Maxwell 1997) 1-12, 1.

This led to a two-pronged system: a Treaty provision setting out an overarching goal alongside secondary Union law aiming to further that goal.[7]

Treaty provisions forming the first prong (the overarching goal) are Article 18 TFEU (ex Article 7 EEC) – specifying that '[w]ithin the field of application of this Treaty and without prejudice to the special provisions mentioned therein, any discrimination on the grounds of nationality shall hereby be prohibited' – and the Treaty rules on the free movement of goods (Articles 34 and 35 TFEU, ex Articles 30 and 34 EEC), workers (Article 45 TFEU, ex Article 48 EEC), establishment (Article 49 TFEU, ex Article 52 EEC), services (Article 56 TFEU, ex Article 59 EEC) and capital (Article 63(1) TFEU, ex Article 67(1) EEC). Each provision encompasses a prohibition on measures that discriminate on grounds of nationality and restrict intra-EU movement.[8] Each of the above Treaty provisions is then followed by series of specific provisions empowering the Union legislature to take action towards achieving free movement;[9] measures adopted on the basis of these provisions form the second prong.

The inclusion of free movement rights in the Treaty text means that '[t]he EU's constitutional text is unusually substantive, detailed and concrete'.[10] As will be set out in greater detail below, this two-pronged system and the substantive nature of EU primary

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[7] This draws on Craig who argues that '[e]ach of [the free movement rules] encapsulates a basic statement of principle which will then be filled out with a variety of legislation', see P Craig, 'Once upon a Time in the West: Direct Effect and the Federalization of EEC Law' (1992) 12(4) *OJLS* 453, 463.

[8] On goods, see e.g. Case 251/78 *Denkavit Futtermittel* EU:C:1979:252, para. 6; Case 15/79 *Groenveld* EU:C:1979:253, para. 7. On workers, see e.g. Case C-279/93 *Schumacker* EU:C:1995:31, para. 26; Case C-55/00 *Gottardo* EU:C:2002:16, para. 35. On establishment, see e.g. Case 2/74 *Reyners* EU:C:1974:68, para. 24. On services, see e.g. Case 33/74 *Van Binsbergen* EU:C:1974:131, para. 25. On capital, see e.g. Case C-302/97 *Konle* EU:C:1999:271, paras 23-24; Case C-423/98 *Albore* EU:C:2000:401, paras 16-17. The ECJ refers to the free movement provisions as giving specific expression to the prohibition on nationality discrimination in Article 18 TFEU, see e.g. Case C-367/98 *Commission v Portugal (Golden Shares)* EU:C:2002:326, para. 24 (capital); Case C-76/05 *Schwarz and Gootjes-Schwarz* EU:C:2007:492 (services); Case C-311/08 *SGI* EU:C:2010:26, paras 31-32 (establishment and capital); Joined Cases C-53/13 and C-80/13 *Strojírny Prostějov* EU:C:2014:2011, paras 31-32 (services); Case C-474/12 *Schiebel Aircraft* EU:C:2014:2139, paras 20-22 (workers and establishment); Case C-583/14 *Nagy* EU:C:2015:737, para. 24 (capital); Case C-296/15 *Medisanus* EU:C:2017:431, para. 65 (goods).

[9] In the Treaty of Rome, the relevant legislative bases were: Article 7 EEC (non-discrimination); Article 33(7) EEC (goods); Articles 49 and 51 EEC (workers); Articles 54-57 EEC (establishment); Articles 63 and 66 EEC (services); Articles 69 and 70(1) EEC (capital). The legislative bases in the Treaty of Rome do not correspond directly with those in the Treaty of Lisbon following several Treaty amendments. The legislative bases relating to free movement and the prohibition on nationality discrimination in the Lisbon Treaty are: Article 18 TFEU (non-discrimination); Articles 48 and 51 TFEU (workers); Articles 52(2) and 53 TFEU (establishment); Articles 64(2) and 64(3) TFEU (capital).

[10] P Syrpis, 'The Relationship between Primary and Secondary Law in the EU' (2015) 52(2) *CMLRev* 461, 484.

law form root causes of norm overlap; once the ECJ instilled life into the Treaty and granted direct effect to the free movement rules, overlap became inevitable between those Treaty rules and any acts of the Union legislature to advance free movement.

2.3.1 Overlaps Concerning Workers

Dating from the late 1950s, successive measures to secure the free movement of workers – based on Articles 46 and 48 TFEU – enshrined the prohibition on nationality discrimination.[11] At the end of the transitional period, the Council adopted two important regulations for the free movement of workers: Regulations 1612/68[12] and 1408/71[13] alongside several other measures relating to workers and former workers.[14]

Regulation 1612/68 concerned access to employment, working conditions and rights of residence for family members in a host Member State.[15] Regulation 1408/71 coordinated social security entitlements across the EU. Yet, despite addressing distinct

[11] Aiming to achieve social security coordination were: Regulation 3/58 concerning the social security of migrant workers [1958] OJ 30/561 (no official English version); Regulation 4/58 laying down the procedure for implementing Regulation 3/58 [1958] OJ 30/597 (no official English version). Governing the free movement of workers more generally were: Regulation 15/61 of 16 August 1961 on initial measures to bring about free movement of workers within the Community [1961] OJ 57/1073 (no official English version); Council Directive on administrative practices and procedures concerning settlement, employment and residence in a Member State of the Community of workers and their families from another Member State [1961] OJ 80/1513 (no official English version). The latter two measures were replaced by: Regulation 38/64/EEC of 25 March 1964 of the Council concerning the free movement of workers within the Community [1964] OJ 62/965 (no official English version); Directive 64/240/EEC of 25 March 1964 on the abolition of restrictions on the movement and residence of Member States' workers and their families within the Community [1964] OJ 62/981 (no official English version).

[12] Regulation 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ Spec Ed (II) 475.

[13] Regulation 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ Spec Ed (II) 416. Accompanying Regulation 1408/71 was Regulation 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation 1408/71 [1972] OJ Spec Ed (I) 160.

[14] Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families [1968] OJ Spec Ed (II) 485; Regulation 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State [1970] OJ Spec Ed (II) 402; Directive 72/194/EEC of 18 May 1972 extending Directive 64/221/EEC to workers exercising the right to remain in the territory of a Member State after having been employed in that State [1972] OJ Spec Ed (II) 474.

[15] Regulation 1612/68 granted extensive equal treatment rights to workers in a host Member State including as regards the 'conditions of employment and work', 'social and tax advantages', 'access to training in vocational schools and retrain-ing centres' and to rights set out in collective agreements (Article 7) as well as requiring that any children 'shall be admitted to that State's general educational , apprenticeship and vocational training courses under the same conditions as the nationals of that State' (Article 12).

aspects of free movement law, Regulations 1612/68 and 1408/71 overlapped in one discrete area: equal access to certain social benefits. Regulation 1408/71 grants 'workers who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States'[16] equal access to social security benefits,[17] while Article 7(2) of Regulation 1612/68 grants '[a worker who is a national of a Member State] … the same social and tax advantages as national workers'.[18] The existence of overlap is not entirely attributable to the Union legislature here;[19] after initially interpreting the concepts of 'social security' and 'social advantages' as mutually exclusive,[20] the ECJ later expanded the definition of 'social advantages' to include 'social security'[21] and thereby created an overlap between the Regulations.

Not long after the adoption of this secondary law framework for securing free movement, the ECJ conferred Article 45 TFEU – according to which 'freedom of movement for workers shall be secured' – with direct effect and created further overlaps with the equal treatment provisions in both Regulations.[22] The result from the perspective of overlap was (and still is) a primary law prohibition on nationality discrimination that sits above the Regulations designed to give effect to that same right.

To flag the complex questions that can result from norm overlap, consider the divergences between Article 45 TFEU and the overlapping Regulations. In terms of personal scope, Article 45 TFEU does not expressly limit free movement rights to those with Member State nationality or those who reside in a host Member State.[23]

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16 Article 2(1). Regulation 1408/71 also applies to stateless persons, refugees and the survivors of workers. After amendment it also covered the self-employed, see Council Regulation 1390/81 extending to self-employed persons and members of their families Regulation 1408/71 [1981] OJ L 143/1.
17 Article 3(1). Article 4 sets out the social security benefits covered.
18 Article 7. Later extended to former workers by Regulation 1251/70.
19 As will be discussed further in Chapters 2 and 5, the Union legislature specified the inter-relationship between the measures. According to Article 42(2) of Regulation 1612/68 that measure 'shall not affect [Regulation 1408/71]'.
20 In early case law the ECJ implied that a social security benefit could not also be a social advantage, see e.g. Case 1/72 *Frilli* EU:C:1972:56, para. 4.
21 E.g. Case C-111/91 *Commission v Luxembourg (childbirth and maternity allowances)* EU:C:1993:92, paras 22, 32.
22 This was said to be on account of its 'absolute nature', see Case 167/73 *Commission v France (Merchant Seamen)* EU:C:1974:35, para. 45.
23 Consider also the difference between Article 45 TFEU and Regulation 1612/68 and Regulation 1408/71. Article 45 TFEU and Regulation 1612/68 apply to 'workers', while Regulation 1408/71 applies to persons 'insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed persons'. See Regulation 1408/71,

Regulations 1612/68 and 1408/71 both only apply to 'nationals of one of the Member States'[24] and require a cross border connection.[25] As a result of this difference, it falls to the ECJ to decide whether the personal scope of Article 45 TFEU should be interpreted in line with that of overlapping secondary law. In terms of material scope, Article 45(2) TFEU refers only to 'employment, remuneration and other conditions of work and employment', while Regulation 1612/68 grants equal access to 'social advantages'. Again, it falls to the ECJ to determine the interactions between overlapping primary and secondary Union law here. Should the ECJ interpret Regulation 1612/68 in line with Article 45 TFEU and restrict the interpretation of 'social advantages' to benefits 'connected with employment'?[26] Or, should the ECJ interpret the notion of 'social advantages' broadly as disconnected from the context of employment?[27] The issues flagged here are now long-resolved, but similar questions about the inter-relationship between overlapping norms of primary and secondary law still recur.[28]

2.3.2 Overlaps Concerning Establishment and Services

Articles 49 and 56 TFEU prohibit rules discriminating against self-employed persons and service providers on grounds of nationality. The second paragraph of Article 49 TFEU explains that '[f]reedom of establishment shall include the right to engage in and carry on non-wage-earning activities, and also to set up and manage enterprises … *under the conditions laid down by the law of the country of establishment for its own nationals*' (emphasis added). Similarly, Article 57 TFEU (defining 'services') refers to how 'a person supplying a service may … temporarily exercise his activity in the State where the service is supplied, *under the same conditions as are imposed by that State on its own nationals*.' As with Article 45 TFEU, the ECJ conferred Articles 49 and 56 TFEU with direct effect.[29]

Article 1(a)(i). A person could, therefore, conceivably fall within the scope of Regulation 1408/71 but not Article 45 TFEU as in Case 75/63 *Unger* EU:C:1964:19, [1964] ECR 177, 185. The personal scope of Regulation 883/2004 (replacing Regulation 1612/68) is also broader than that of Article 45 TFEU and Regulation 492/2011 (replacing Regulation 1612/68).

[24] Regulation 1408/71, Article 2(1). See also, Regulation 1612/68, Article 7(1).

[25] Regulation 1612/68, Article 7(1).

[26] The ECJ initially took this approach. In *Michel S,* the ECJ held that Regulation 1612/68 only extended to benefits 'connected with employment' (Case 76/72 *Scutari* EU:C:1973:46, para. 9).

[27] The ECJ now adopts this approach, see e.g. Case 249/83 *Hoeckx* EU:C:1985:139, para. 20; Case 59/85 *Reed* EU:C:1986:157, paras 26-29.

[28] See Chapter 3.

[29] *Reyners* (n 8), para. 32 (Article 52 EEC); *Van Binsbergen* (n 8), para. 27 (Articles 59 and 60 third paragraph EEC). Controversy surrounded the ECJ decision to recognise the Treaty rules on establishment and services as directly effective. Articles 52 and 59 EEC set out the aim of achieving free movement 'within

Recognising the Treaty rules as directly effective created overlaps with secondary norms that aimed to secure free movement. For example, an overlap developed between Articles 49 and 56 TFEU and Directive 73/148,[30] which required Member States to abolish restrictions on:

> … (a) nationals of a Member State who are established or who wish to establish themselves in another Member State in order to pursue activities as self-employed persons, or who wish to provide services in that State; [and]
>
> (b) nationals of Member States wishing to go to another Member State as *recipients of services*.[31]

Again, norm overlap here raised complex questions that are worth highlighting even if they are now resolved. The Directive was somewhat broader than the overlapping freedom to *provide* services set out in Article 49 TFEU and extended to service *recipients*,[32]

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the framework of the provisions set out below' and are then followed by instructions for the Council to 'draw up a general programme for the abolition of existing restrictions on freedom of establishment within the Community' (Articles 54(1) and 63(1) EEC). This wording implies that these goals can only be achieved via secondary legislation and Dehousse notes that, at the time, general consensus accepted the need for 'Council directives … to give effect to the rule that nationals of other member states were to be allowed to set up and carry on business in the same way as a member state's own nationals' (R Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (Macmillan 1998) 80). The ECJ responded to these concerns in *Reyners* and held that the general prohibition of discrimination on grounds of nationality was 'one of the fundamental legal provisions [of the EU that could] be made easier by, but not made dependent on, the implementation of a programme of progressive measures' (paras 24, 36).

[30] Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [1973] OJ L 172/14 (replacing Directive 64/220/EEC of 25 February 1964 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [1964] OJ Spec Ed (I) 115). Also relating to free movement, but not including a prohibition on nationality discrimination were: Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [1964] OJ Spec Ed (I) 117; Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity [1975] OJ L 14/10; Directive 75/35/EEC of 17 December 1974 extending the scope of Directive 64/221/EEC on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health to include nationals of a Member State who exercise the right to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity [1975] OJ L 14/14.

[31] Article 1 (emphasis added).

[32] In *Luisi and Carbone,* the ECJ recognised the right to receive services as a necessary corollary of the right to provide services, see Joined Cases 286/82 and 26/83 *Luisi and Carbone* EU:C:1984:35, para. 10. On how 'EU law on the free movement of persons had been Court-fuelled but legislature-led' see, N Nic Shuibhne, 'The Third Age of EU Citizenship: Directive 2004/38 in the case law of the Court of Justice' in P Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (CUP 2012) 331-362, 334-336.

leaving the ECJ to decide whether to interpret the Treaty broadly and in line with overlapping secondary law.[33]

2.3.3 Overlaps Concerning Goods and Capital

The development of overlaps in the fields of goods and capital took a different trajectory than those relating to persons.

In relation to goods, the only relevant measure – Directive 70/50[34] – expired at the end of the transitional period.[35] This was just as Articles 34 and 35 TFEU gained direct effect[36] and so no overlap arose. In the period since, no overlaps have developed due to the nature of the available legal bases. The most appropriate legal basis for measures relating to goods is Article 114 TFEU (ex Article 100 EEC), which empowers the Council to issue directives 'for the *approximation* of such legislative and administrative provisions of the Member States as have a direct incidence on the establishment or functioning of the Common Market' (emphasis added).[37] Directives adopted on the basis of Article 114 TFEU do not prohibit nationality discrimination but instead stipulate common standards for the Member States meaning overlaps do not develop.

In relation to the free movement of capital, no overlaps emerged – despite the existence secondary law[38] – on account of the ECJ's ruling in *Casati* that Article 63(1) TFEU (then

[33] See Chapter 2 for a discussion of the utility of the principle of *lex superior* in this context.
[34] Directive 70/50/EEC of 22 December 1969 based on the provisions of Article 33 (7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty [1970] OJ Spec Ed (I) 17.
[35] Article 33(7) EEC was the only legislative basis specifically relating to goods and was itself limited to the transitional period.
[36] Case 74/76 *Ianelli e Volpi* EU:C:1977:51, para. 13
[37] The unanimity requirement (later removed) meant that few directives were adopted. Weiler notes that '[t]he Treaty rule on decision-making and the Court's jurisprudence on the preemptive effect of such decision-making combined to chill the climate in which the [EU] and its Member States were to make critical decisions to eliminate the numerous barriers to a true common market. Not only was it difficult to achieve consensus on one [EU} norm to replace the variety of Member State norms, but also there was the growing fear that once such a norm was adopted, it would lock all Member State into a discipline from which they could not exit without again reaching unanimity' (J Weiler, 'The Transformation of Europe' (1991) 100(8) *Yale Law Journal* 2403, 2457).
[38] Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [1988] OJ L 178/5.

Article 67(1) EEC) lacked direct effect.[39] An overlap only developed in this field in 1995 on account of amendments made to Article 63(1) TFEU (then Article 73c(1) EC).[40]

2.3.4 The General Prohibition on Discrimination

Overlapping with each of the sector specific prohibitions on nationality discrimination is Article 18 TFEU, which the ECJ recognised as directly effective in *Forcheri*.[41] *Prima facie*, the relationship between Article 18 TFEU and overlapping primary law seems quite simple.[42] Article 18 TFEU is specifically 'without prejudice to the special provisions [in the Treaties]' ostensibly denoting the legality of e.g. Article 45(4) TFEU (ex Article 48(4) EEC), which permits continued discrimination for jobs in the public service.

The broad wording of Article 18 TFEU contrasts with the more specific expressions of the prohibition on discrimination set out in secondary Union law. Tricky questions surrounded the inter-relationship between Article 18 TFEU and overlapping secondary norms. For example, in *Forcheri*, the Italian wife of a Community official undertook vocational training in Brussels where she and her husband resided (and he worked). The Belgian institution charged her a higher enrolment fee (for non-nationals) than that charged to Belgian nationals. Mrs Forcheri challenged differences in the fee charged as nationality discrimination. Union secondary law did not grant the spouse of a migrant worker equal access to education, Regulation 1612/68 only granted this right to the children of migrant workers. Again, the ECJ had to determine the extent to which the interpretation of primary law should take account of overlapping secondary law. Could Mrs Forcheri rely on this residual non-discrimination provision to claim equal treatment rights outside of those articulated in secondary law? As is now well-known, the ECJ held that Mrs Forcheri could rely on Article 18 TFEU.[43]

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[39] Case 203/80 *Casati* EU:C:1981:261, para. 10.
[40] Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera* EU:C:1995:451, para. 41.
[41] Case 152/82 *Forcheri* EU:C:1983:205, para. 18.
[42] For further discussion, see Chapter 4.
[43] *Forcheri* (n 41), paras 17-18. See also e.g. Case 293/83 *Gravier* EU:C:1985:69, paras 23-25; Case 186/87 *Cowan* EU:C:1989:47.

2.4. The Development of Overlapping Norms Prohibiting Sex Discrimination

Article 157(1) TFEU (ex Article 119 EEC) sets out the principle of equal pay for men and women.[44] By requiring Member State action, Article 157(1) TFEU was something of a misnomer within the EEC Treaty's provisions on social policy, which mostly contained a number of rather weak objectives.[45] As originally introduced, the provision obliged Member States to 'ensure and subsequently maintain the application of the principle of equal remuneration for equal work as between men and women workers'.

2.4.1 Constructing the Basic Framework of Overlapping Norms

Article 157(1) TFEU had little impact for almost the first fifteen years of its existence. Although the Commission reminded the Member States of their responsibility to secure equal pay in 1960,[46] the Member States instead agreed among themselves to postpone this obligation.[47] As a consequence of Member State inactivity, other actors sprang into action and set in motion a chaotic process of norm development and, later, norm overlap.

At the EU level, shifts in policy debates led to greater concerns for sex equality, not just equal pay. Several reports either prepared for or carried out by the Commission in the late 1960s highlighted the discrimination women faced at work.[48] In addition, women in the workplace became increasingly mobilised[49] leading to mounting fears of industrial

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[44] Motivating the inclusion of a right to equal pay was not any particular concern for the rights of women. Almost exclusively economic concerns led to Article 157 TFEU's inclusion in the Treaty framework. The French government in particular had argued for a level playing field in terms of social protection in order to prevent the comparative disadvantage of countries with higher levels of social protection (France had recently recognised a right to equal pay for men and women), see e.g. J Forman, 'The Equal Pay Principle under Community Law – A Commentary on Article 119 EEC' (1982) 9(1) *Legal Issues of Economic Integration* 17, 19; C Barnard, 'The Economic Objectives of Article 119' in TK Hervey and D O'Keeffe (eds), *Sex Equality Law in the European Union* (Wiley 1996) 321-34; C Hoskyns, *Integrating Gender: Women, Law and Politics in the European Union* (Verso 1996) 54-57; RA Cichowski, 'Judicial Rulemaking and the Institutionalization of European Union Sex Equality Policy' in A Stone Sweet, W Sandholtz and N Fligstein (eds), *The Institutionalization of Europe* (OUP 2001) 113-136, 117-18.

[45] Hoskyns explains that Article 119 EEC differed from other Treaty provisions in the social policy field due to the fact that it was originally intended for another chapter of the Treaty, see Hoskyns (n 44) 57.

[46] Commission, 'Recommendation by the Commission to the Member States relating to Article 119 of the Treaty' [1960] EEC Bull Nos 6&7, 45-47. The Treaty of Rome obliged Member States to implement the principle of equal pay for equal work by the end of the first stage of the common market i.e. by 31 December 1961.

[47] Council, 'Decisions Adopted by the Council at the End of the Year' [1962] EC Bull No 1, 8-10.

[48] See further Hoskyns (n 44) 83-84 and the references cited therein.

[49] In 1966, there had been a particularly lengthy strike for equal pay in Herstal (Belgium). Hoskyns argues

action in the early 1970s due to the poor economic situation.[50] Responding to these developments, the Council of Ministers invited the Commission to draw up a Social Action Programme.[51] Top priority was a directive on equal pay for men and women,[52] although the Commission also envisaged further acts to improve the position of women more generally.

Parallel to these policy developments, Belgian labour lawyer Eliane Vogel-Polsky began a litigation strategy to test her theory that Article 157 TFEU was 'self-executing'.[53] Vogel-Polsky brought a series of cases before the Belgian courts on behalf of a former air hostess: Ms Defrenne. The Belgian airline Sabena terminated Ms Defrenne's contract of employment when she reached the age of forty – a practice maintained only for women. The Belgian courts referred several questions to the ECJ asking whether Sabena's conduct breached Article 157 TFEU, including a question on the direct effect of Article 157 TFEU. The first case to reach the ECJ did not address this point but instead concerned retirement pensions, which – on account of their connection to social policy – are not 'pay' under Article 157 TFEU.[54] As a result, the legislative programme continued with many in the institutions believing Article 157 TFEU lacked direct effect.[55]

These nascent developments – the commencement of a legislative programme and the litigation of Article 157 TFEU – came to a head at fairly similar times, dramatically altering the landscape of sex equality norms. In 1975, the EU legislature adopted Directive 75/117 on equal pay between men and women,[56] which obliged Member

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the Herstal strike is often understood as an important factor in increasing the visibility and awareness of women's rights in the workplace, see Hoskyns (n 44) 65-68.

[50] J Shaw, J Hunt and C Wallace, *Economic and Social Law of the European Union* (Palgrave Macmillan 2007) 348.

[51] [1972] EC Bull Vol. 5, No. 10, 19.

[52] Commission, 'Social Action Programme' (1973) Information Memo P-52/73, 1.

[53] In 1967, Vogel-Polsky wrote an important article in a Belgian legal journal arguing for the ECJ to recognise Article 157 TFEU as directly effective (or 'self-executing'), see E Vogel-Polsky, 'L'Article 119 du traité de Rome – peut-il être considéré comme *self-executing*?' *Journal des Tribunaux* (Brussels, 15 April 1967), cited by Hoskyns (n 44) 68. Vogel-Polsky's argument focused on the comparability of Article 157 TFEU with Article 110 TFEU, which the ECJ had recently recognised as directly effective in Joined Cases 31/62 and 33/62 *Lütticke* EU:C:1962:49.

[54] Case 80/70 *Defrenne I* EU:C:1971:55, paras 7-8.

[55] Hoskyns draws attention, in particular, to one Commission official in charge of wage policy who was unsure of the direct effect of Article 119 EEC and who believed that 'legislation at the national level was required to cover continuing gaps and inadequacies', see Hoskyns (n 44) 85.

[56] Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member

States to give effect to the equal pay principle. Less than a year later, the ECJ in *Defrenne II* recognised Article 157 TFEU as capable of direct effect.[57] Importantly, and in contrast to the solely vertical effects of directives,[58] the ECJ held that Article 157 TFEU was capable of vertical and horizontal direct effect.[59]

By recognising the Treaty as directly effective the ECJ created 'a genuinely individual right in [EU] law to non-discrimination'.[60] As above, the existence of a substantive and directly effective Treaty right led to an overlap with secondary Union law implementing that Treaty norm. Mirroring the issues flagged in Section 2.3, Article 157 TFEU and Directive 75/117 did not place identical obligations on the Member States. The Directive granted a right to equal pay for equal work *and* 'work to which equal value is attributed' and so expanded beyond the right in Article 157 TFEU (before amendment) to equal pay for the *same work*.[61] However, in contrast to the Directive, Article 157(1) TFEU could be invoked in disputes between private parties. The result was to set up two alternative rights to equal pay: one under the Directive with a slightly broader substantive scope (equal pay for *work of equal value*) and the other under the Treaty, which could be relied upon against private parties.

A question recurring throughout this Phase is how Article 157 TFEU should inter-relate with overlapping secondary law. The question is somewhat different here than in the context of nationality discrimination. No legislative basis accompanied Article 157 TFEU as originally drafted in the EEC Treaty. Unlike with e.g. Regulation 1612/68 and Article 45 TFEU, the basis of Directive 75/117 is not an empowering provision specifically linked to Article 157 TFEU. In fact, the basis for Directive 75/117 was Article 114 TFEU (ex Article 100 EEC) on the approximation of legislation for the

States relating to the application of the principle of equal pay for men and women [1975] OJ L45/19. On the adoption of which see, C Docksey, 'The European Community and the Promotion of Equality' in C McCrudden (ed), *Women, Employment and European Equality Law* (Eclipse 1987) 1-22, 3.

[57] Article 157 TFEU is capable of direct effect in cases where discrimination 'may be identified solely with the aid of the criteria based on equal work and equal pay'. When discrimination 'can only be identified by reference to more explicit implementing provisions of a Community or national character' Article 157 TFEU does not have direct effect, see Case 43/75 *Defrenne II* EU:C:1976:56, para. 18.

[58] See Case 152/84 *Marshall* EU:C:1986:84, para. 48; Case C-91/92 *Faccini Dori* EU:C:1994:292, para. 24.

[59] *Defrenne II* (n 57), para. 39.

[60] Bell, *Anti-Discrimination Law and the European Union* (n 1) 45.

[61] This brings the law of equal pay into line with ILO Convention No 100 on Equal Remuneration for Men and Women Workers for Work of Equal Value (adopted 29 June 1951, entered into force 23 May 1953) 165 UNTS 303.

purposes of the establishment and functioning of the internal market. This internal market basis contrasts with the location of Article 157 TFEU in the Treaty chapter on social policy. This raises the question whether the disconnect between the legislative basis and Article 157 TFEU affects how that Treaty provision should inter-relate with overlapping secondary Union law (a point picked up again in Chapter 3).

Returning to the creation of further overlaps, two developments followed swiftly from the adoption of Directive 75/117. In 1976, the Union legislature adopted Directive 76/207 on equal treatment between men and women in access to employment, vocational training and working conditions.[62] Soon after, the ECJ expressly recognised the general principle of non-discrimination on grounds of sex.[63] According to the ECJ in *Defrenne III*, the 'elimination of discrimination based on sex forms part of [the] fundamental rights' protected by EU law.[64] By recognising a general principle requiring equal treatment between men and women, a further layer of overlap is added to all of the overlaps discussed in this sub-Section.

Defrenne III leaves two key issues unresolved: first, does the content of the general principle requiring equal treatment between men and women differ from written expressions of the same right in e.g. Directives 75/117 and 76/207; secondly, how does that general principle inter-relate with written expressions of the prohibition on sex discrimination. The decision in *Defrenne III* did not clarify either the differences between the general principle and Directive 76/207 or the relationship between them. Impliedly, the temporal scope of the general principle was similar to that of Directive 76/207; the ECJ ruled that Ms Defrenne could not rely on the general principle to claim equal treatment from a date prior to Directive 76/207's entry into force since the EU had not, at that time, 'assumed any responsibility for supervising and guaranteeing the

[62] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L 39/40. The legal basis was not Article 114 TFEU, but the residual provision for achieving EU objectives in (what is now) Article 352 TFEU.
[63] Applicants before the ECJ had argued for the recognition of a general principle prohibiting discrimination on grounds of sex in Case 20/71 *Bertoni v Parliament* EU:C:1972:48, para. 3. The ECJ held that the Staff Regulations cannot treat officials differently according to their gender if this creates 'arbitrary difference of treatment between officials' (*Bertoni v Parliament*, paras 12-13). The ECJ thereby implies the existence of a general principle prohibiting sex discrimination but does not explicitly recognise any such principle.
[64] Case 149/77 *Defrenne III* EU:C:1978:130, paras 26-27.

observance of equality between men and women in working conditions other than remuneration'.[65] The apparent similarity between Directive 76/207 and the overlapping general principle led to questions over 'the exact force of the principle of equal treatment and its relative weight … where secondary legislation actually permits discrimination.'[66]

By 1978, a complex framework of highly similar norms prohibiting sex discrimination had developed following norm development in different avenues: judicial, legislative and Treaty amendment. Hierarchically superior, with horizontal and vertical direct effect, was Article 157 TFEU. However, before amendment, this Treaty provision was of narrower substantive scope than Directive 75/117. Following hierarchically was a general principle of non-discrimination on grounds of sex that expanded beyond equal pay.[67] At the bottom of the norm-hierarchy, at least in a formal sense, were two directives: Directive 75/117 on equal pay and Directive 76/207 on equal treatment. When more than one of these norms is *prima facie* applicable, the ECJ is tasked with determining how each source should work together.

2.4.2 Adding Further Secondary Norms

Added to these existing complexities were Directive 79/7[68] on social security and Directive 86/378[69] on equal treatment in occupational social security schemes. The former aimed to fill the gaps left by *Defrenne I* and prohibited discrimination on grounds of sex as regards statutory schemes or social assistance benefits that protected against sickness, invalidity, old age, accidents at work, occupational diseases and unemployment.[70] As a sensitive area for the Member States, agreement was particularly difficult to reach,[71] and as a result the measure contained a number of limitations

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[65] *Defrenne III* (n 64), para. 30.
[66] G de Búrca, 'The Role of Equality in European Community Law' in A Dashwood and S O'Leary (eds), *The Principle of Equal Treatment in EC Law* (Sweet & Maxwell 1997) 13-34, para. 2.07.
[67] The ECJ held that working conditions such as retirement age, at stake in *Defrenne III,* fell outside the scope of Article 157 TFEU in *Defrenne III* (n 64), para. 24.
[68] Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1979] OJ L 6/24.
[69] Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes [1986] OJ L 225/40.
[70] Directive 79/7, Article 3.
[71] Shaw, Hunt and Wallace (n 50) 372. Initially, the aim had been to include rules on social security within the Equal Treatment Directive, but these had to be removed in order to secure agreement on the Equal

regarding pensionable age, survivors' pensions and other advantages relating to pensions.[72] The latter aimed to secure equal treatment in private schemes. Due to lobbying pressure from the pensions and life insurance industries, Directive 86/378 also permitted derogations from principle of equal treatment.

The relationship between the directly effective right in Article 157 TFEU and overlapping secondary law emerges again here. Before the adoption of Directive 86/378 on occupational social security schemes, the ECJ recognised that benefits received under contractual schemes amounted to 'pay' for the purposes of Article 157(1) TFEU.[73] Given the exception-riddled nature of the Directive, the ECJ was again faced with the inter-relationship between overlapping primary and secondary Union law, this time where a potential conflict arises.[74] The resulting decision in *Barber* essentially overruled the derogations from equal treatment in Directive 86/378.

2.5. Summary

To conclude, by the end of Phase I a complex picture of overlapping norms prohibiting discrimination on the grounds of both nationality and sex had developed. Underscoring these overlaps was a general principle of equality derived from the far narrower guarantee of equality between producers and consumers in the agricultural field. The discussion highlighted three different causes of norm overlap: first, the existence of a highly substantive Treaty framework given effect by secondary Union law; secondly, the use of written sources of the prohibition on discrimination to derive overlapping general principles; finally, the Union legislature's failure to consider potential overlaps between secondary measures.

Treatment Directive, see S Prechal and N Burrows, *Gender Discrimination Law of the European Community* (Dartmouth 1990) 163.

[72] Directive 79/7, Article 7.

[73] Case 170/84 *Bilka* EU:C:1986:204, para. 22.

[74] The ECJ in *Barber* held that it could not, see Case C-262/88 *Barber* EU:C:1990:209, para. 32. The Treaty-framers themselves appeared to recognise this when, following the *Barber* decision, the Maastricht Treaty included a Protocol specifically addressing the ECJ's decision in Barber.

3. PHASE II: 1991-2000

3.1. Overview

Phase II extends from the entry into force of the Maastricht Treaty until the adoption of the Amsterdam Treaty. New overlaps arising during this Phase mostly stem from the use of written Union law as an inspirational source for general principles of Union law. Several developments during this Phase also lay the groundwork for further overlaps to develop; the Treaty of Amsterdam added new legislative bases empowering the Union legislature to advance equal treatment, while the growing importance of fundamental rights protection led to the drafting and solemn proclamation of an EU Charter of Fundamental Rights.

3.2. The Development of Overlapping Norms Prohibiting Nationality Discrimination

The Maastricht Treaty did not alter the Treaty framework set out in Phase I; the basic structure of the general prohibition in Article 18 TFEU and the more specific free movement provisions remained unchanged. Creating a further overlap during this Phase, the ECJ recognised the prohibition on discrimination on grounds of nationality as a general principle of Union law. Furthermore, a change that cannot go unmentioned is the creation of Union citizenship; nationals of Member States were now citizens of the Union 'with the right to move and reside freely within the territory of the Member States'[75] and soon Union citizenship would be heralded as the 'the fundamental status of nationals'.[76] This Treaty change paved the way for further overlaps – as discussed in Phase III – and altered the context within which existing overlapping provisions interacted.

A new overlap in the field of nationality discrimination developed following the ECJ's decision in *Corsica Ferries* in which it explicitly recognised that the prohibition of discrimination on grounds of nationality is a general principle of Union law.[77] That

[75] Article 8(1) EC (now Article 21(1) TFEU).
[76] Case C-184/99 *Grzelczyk* EU:C:2001:458, para. 31.
[77] Case C-18/93 *Corsica Ferries* EU:C:1994:195, para. 19. See also, e.g. Case C-262/96 *Sürül* EU:C:1999:228, para. 64; Case C-171/01 *Wählergruppe Gemeinsam* EU:C:2003:260, para. 59; Case C-28/04 *Tod's and Tod's France* EU:C:2005:418, para. 36; Case C-40/05 *Lyyski* EU:C:2007:10, para. 33; Case C-222/07 *UTECA* EU:C:2009:124, para. 37; Case C-382/08 *Neukirchinger* EU:C:2011:27, para. 30; Case C-

judgment is worth noting here since the ECJ's use of written norms to inspire general principles is a reason behind the accumulation of overlapping norms. The ECJ does not clarify whether the general principle is identical to Article 18 TFEU (in terms of e.g. what triggers its application, its content and its capacity for direct effect) or whether it might apply in situations not covered by Article 18 TFEU.

Turning back to the creation of Union citizenship, which potentially altered the situations in which applicants can invoke Article 18 TFEU and the overlapping general principle, Article 18 TFEU applies to all situations falling 'within the scope of the Treaties', subject to any more specific provisions in the Treaties. The creation of Union citizenship, and the accompanying rights *inter alia* to move and reside, expanded the scope of the Treaties. By the end of Phase I, the ECJ had recognised limited situations in which non-economically active persons could rely on Article 18 TFEU.[78] With the creation of Union citizenship, the potential arose for Member State nationals to rely on the 'status of citizen of the Union in order to assert the principle of non-discrimination, throughout the entire area in which the case law applies'.[79] This would dramatically alter the potential to rely on Article 18 TFEU where a Union citizen could not rely on existing secondary law.

However, Article 21(1) TFEU further complicated matters by adding the caveat that Union citizens only have the right to move and reside 'subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'. This provision turns the hierarchy of norms on its head by subjecting the primary law right to move and reside to limits contained in secondary law. Article 18 TFEU is only 'without prejudice to any special provisions' in the Treaties and so does not contain similar restrictions. If a Union citizen seeks to rely on Article 18 TFEU in situations not covered by the free movement rules, could the capacity for secondary law to limit primary law rights 'be imputed back to Article 18 indirectly by way of Article 21 TFEU

628/11 *International Jet Management* EU:C:2014:171, paras 34, 59; *Schiebel Aircraft* (n 8), paras 19-20; Case C-171/13 *Demirci and Others* EU:C:2015:8, para. 50.

[78] Limited exceptions had developed, see e.g. *Forcheri* (n 41); *Gravier* (n 43).

[79] Case C-85/96 *Martínez Sala* EU:C:1997:335, Opinion of AG La Pergola, para. 23.

as a "special provision" in the Treaty'?[80] And what role is there here for the general principle of non-discrimination on grounds on nationality?

Agreeing with Nic Shuibhne, even just posing the above questions 'induces normative migraine'.[81] However, such questions strike at the heart of what principles or express clauses determine the inter-relationship between Article 18 TFEU and overlapping secondary law. In the early 1990s, these questions were of particular importance given the adoption of several measures specifically addressing the position of the economically inactive. Under Directives 90/364,[82] 90/365[83] and 93/93[84] a national of a Member State could claim a right of residence in a host Member State so long as they had sufficient resources and sickness insurance.[85] If the limitations in Union secondary law could limit Article 18 TFEU, mobile Union citizens would be unable, for example, to claim equal access to social benefits without meeting the requirements of sufficient resources set out in secondary law.[86]

3.3. The Development of Overlapping Norms Prohibiting Sex Discrimination

By the end of Phase I, the picture of overlapping norms prohibiting sex discrimination was quite a mess: there was a directly effective Treaty right to equal pay, various secondary laws and a general principle prohibiting sex discrimination of uncertain scope. During Phase II, there is a major overhaul of the Treaty and legislative framework prohibiting sex discrimination. Most changes do not create new overlaps; but where overlaps do develop, responsibility lies with the legislature.

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[80] N Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52(4) *CMLRev* 889, 909.
[81] Nic Shuibhne, 'Limits Rising, Duties Ascending' (n 80) 935.
[82] Council Directive 90/364/EEC of 28 June 1990 on the right of residence [1990] OJ L 180/26, Article 1(1).
[83] Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L 180/28, Article 1(1).
[84] Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students [1993] OJ L 317/59, Article 1. Replacing Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students [1990] OJ L 180/30.
[85] Students only had to 'attest' to having sufficient resources.
[86] How the ECJ resolved these questions during this Phase is well-known. The ECJ interpreted the free movement provisions in light of Union citizenship to develop a series of Treaty-based non-discrimination rights beyond those in existing secondary law, see e.g. Case C-85/96 *Martínez Sala* EU:C:1998:217, paras 22-63; *Grzelczyk* (n 76), para. 13; Case C-209/03 *Bidar* EU:C:2005:169, para. 43.

During the 1990s, a renewed interest in social policy[87] and a shift to more centre-left governments[88] led to the promulgation of several measures aiming to ensure equality between men and women such as Directive 92/85 on the protection of pregnant workers,[89] Directive 96/34 on parental leave,[90] Directive 97/80 on the burden of proof[91] and Directive 97/81 on part-time work.[92] These measures mostly concerned different aspects of equal treatment and so did not overlap with one another. However, by adopting Directive 92/85 on pregnant workers, the Union legislature created an overlap with Directive 76/207 on equal treatment between men and women in employment. This overlap is worth considering in more detail since it shows the role of legislative drafting in creating overlaps.

Before the Union legislature adopted Directive 92/85 on pregnant workers, the ECJ held that refusing to hire or renew the contract of a female worker on account of her pregnancy amounted to direct discrimination on grounds of sex prohibited by Directive 76/207.[93] Despite this existing case law, Directive 92/85 does not reflect the state of the law at the time of its adoption; Article 10 of the Directive, requires only that Member States 'take the necessary measures to prohibit the dismissal of workers … during the period from the beginning of their pregnancy to the end of the maternity leave'.[94] In contrast to Directive 76/207, Directive 92/85 does not prohibit a refusal to hire or to renew a fixed-term contract on grounds of pregnancy.[95] Did the Union legislature intend

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87 Bell, *Anti-Discrimination Law and the European Union* (n 1) 11.
88 Bell, *Anti-Discrimination Law and the European Union* (n 1) 48.
89 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers who have recently given birth or are breastfeeding [1992] OJ L 348/1.
90 Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC [1996] OJ L145/11.
91 Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex [1998] OJ L 14/6.
92 Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC [1997] OJ L 14/9.
93 On refusal to hire, see Case C-177/88 *Dekker* EU:C:1990:383, para. 12; later extended to include the non-renewal of a fixed-term contract on grounds of pregnancy in Case C-438/99 *Jiménez Melgar* EU:C:2001:509, para. 47. The ECJ clarified the limits of the prohibition on discrimination in *Hertz*. Ms Hertz suffered from an illness attributable to pregnancy in the period after the end of her maternity leave. The ECJ held that was not unlawful for her employer to dismiss her after the end of her maternity leave as pregnancy-related illness should, at that point, be treated as indistinguishable from any other illness, see Case C-179/88 *Hertz* EU:C:1990:384, para. 16.
94 Directive 92/85, Article 10.
95 The original proposal emanating from the Commission's equality unit did provide for protection during selection, however, this was removed from the official proposal, see E Ellis, 'Protection of Pregnancy and Maternity' (1993) 22(1) *ILJ* 63, 63.

to limit the right to non-discrimination to women in employment? The Union legislature left the ECJ to determine the impact of the newer directive on the existing legal framework, despite foreseeing the potential overlaps and inevitable tension; the drafting process led to the removal of a priority clause clarifying the relationship between measures and specifying that the directive on pregnant workers is 'without prejudice to the provisions of the Council Directives concerning equal treatment for men and women'.[96]

Underscoring each of the new directives adopted during this Phase was the general principle prohibiting discrimination on grounds of sex recognised in *Defrenne III*. The ECJ did not clarify the role or autonomous value of the general principle in Phase I. Expounding on the distinct contribution of the general principle, in this Phase the ECJ relied upon the general principle to interpret Directive 76/207 as precluding discrimination on the grounds of gender reassignment.[97] The limits of the general principle prohibiting discrimination on grounds of sex were, however, also further specified during this Phase. In *Grant*, the ECJ refused to interpret Article 157 TFEU as prohibiting discrimination on grounds of sexual orientation[98] on the grounds that general principles 'cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competences of the [EU].'[99] In consequence, the precise role of the general principle prohibiting sex discrimination in the context of norm overlap remained unclear.

As Phase II drew to a close, the Treaty framework prohibiting sex discrimination underwent several changes. Alongside certain amendments entrenching a commitment to sex equality,[100] the Amsterdam Treaty added two further legislative bases. Article 19

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[96] Commission, 'Proposal for a Council Directive concerning the protection at work of pregnant women or women who have recently given birth' COM(90) 406 final, 4.
[97] Case C-13/94 *P v S* EU:C:1996:170, paras 18-19. This jurisprudence was extended to matters relating to 'pay' in Case C-117/01 *K.B.* EU:C:2004:7, para. 26. There are other instances of legislation being read broadly in combination with general principles e.g. Case C-83/14 *CHEZ Razpredelenie Bulgaria* EU:C:2015:480.
[98] Case C-249/96 *Grant* EU:C:1998:63, para. 28.
[99] *Grant* (n 98), para. 45. The ECJ maintained this position in *D and Sweden v Council* despite interventions from a number of Member States and the addition of a legislative basis in the Treaties, see Joined Cases C-122/99 P and C-125/99 P *D v Council* EU:C:2001:304, para. 52.
[100] See, in particular, the mainstreaming provisions in Articles 8 and 10 TFEU. In addition, Article 157(4) TFEU allowed for positive discrimination to enhance the position of women.

TFEU (discussed again below) empowered the Council to 'take appropriate action to combat discrimination based on sex'. Article 157(3) TFEU specified that the Parliament and Council 'shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.' The inclusion of sex in both legislative bases epitomises the somewhat haphazard development of EU equality law flagged throughout this Chapter. What makes the inclusion of sex within Article 19 TFEU all the more needless is that measures adopted on that basis (unlike Article 157(3) TFEU) require unanimity. As a final change to the Treaty framework – and to show how better drafting can ameliorate the complexities created by norm overlap – the Amsterdam Treaty brought Article 157(1) TFEU into line with Directive 75/117 to require 'equal pay for work of equal value'.

3.4. The Transformation of Non-Discrimination into a Fundamental Right

Heightened activism during the 1990s also led to several major changes relating to equal treatment (in a more general sense) making their way into the Treaty of Amsterdam. During this Phase, the number of pan-European NGOs rose[101] alongside increased action on the part of the Commission[102] and the European Parliament.[103] The cumulative effect of these campaigns led to several changes in the Amsterdam Treaty including a new empowering provision to tackle discrimination.[104] According to Article 19(1) TFEU:

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[101] E.g. the Starting Line Group, which campaigned for an anti-racism directive and a legislative basis for anti-racism legislation, and the European Disabled People's Parliament, which called for a general anti-discrimination clause. See further, Bell, *Anti-Discrimination Law and the European Union* (n 1) 68, 106.

[102] In 1988, a communication from the Commission proposed that the Council make a resolution against racism and xenophobia. The resulting Council resolution watered-down the Commission's proposal to such an extent that the Commission refused to be associated with it. See Commission, 'Proposal for a Council resolution on the fight against racism and xenophobia (Communication)' COM(88) 318 final; Council, 'Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 29 May 1990 on the fight against racism and xenophobia' [1990] OJ C 157/1.

[103] The European Parliament commissioned a number of reports into the rise of racism and xenophobia in Europe, most notably European Parliament, 'Report drawn up on behalf of the Committee of Inquiry into the Rise of Fascism and Racism in Europe (Evrigenis Report)' (1986) A2-160/85/rev; European Parliament, 'Committee of Inquiry into Racism and Xenophobia (Ford Report)' (1990) A3-195/90. See further, C Brown, 'The Race Directive: Towards Equality for all the Peoples of Europe?' (2001) 21(1) *YEL* 195, 199; Bell, *Anti-Discrimination Law and the European Union* (n 1) 62.

[104] Bell, *Anti-Discrimination Law and the European Union* (n 1) 106. For an extensive discussion of the events leading to the introduction of Article 19 TFEU, see M Bell and L Waddington, 'The 1996 Intergovernmental Conference and the Prospects of a Non-Discrimination Treaty Article' (1996) 25(4) *ILJ* 320.

> Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

The inclusion of a legislative basis (rather than a prohibition) did not add to existing overlaps per se, but it paved the way for overlaps outside the fields of nationality and sex discrimination.

Such was the momentum for legislation countering discrimination, particularly on grounds of race, that the Commission began preparing a legislative package before the Treaty of Amsterdam had even entered into force.[105] To capitalise on the attention surrounding race and the perceived 'dangers of ethnic conflict within an enlarged EU',[106] the Commission set out plans for two directives and a programme of action designed to complement the legislation.[107] The first proposed directive aimed 'to combat discrimination in the labour market' on all the grounds specified in Article 19 TFEU, except for sex. Given the greater support for action regarding race, the second proposed directive aimed 'to combat discrimination on grounds of racial and ethnic origin' in the labour market and beyond. Before the end of 2000, the legislature adopted both Directive 2000/43 (prohibiting discrimination on grounds of race)[108] and Directive 2000/78[109] (prohibiting discrimination on the grounds of religion or belief, disability, age or sexual orientation).[110]

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105 Following its extraordinary meeting in Tampere on 15 and 16 October 1999, the Council invited the Commission to come forward with proposals on the fight against racism and xenophobia.
106 D Schiek, 'Broadening the Scope and the Norms of EU Gender Equality Law: Towards a Multidimensional Conceptions of Equality Law' (2005) 12(4) *MJ* 427, 438.
107 Commission 'Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain Community measures to combat discrimination' COM (1999) 564 final, 8. According to the Commission, the directive would provide 'a solid basis for the enlargement of the European Union which must be founded on the full and effective respect of human rights', adding that enlargement made 'it essential to put into place a common European framework for the fight against racism', see Commission, 'Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Explanatory Memorandum)' COM (1999) 566 final, 4.
108 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22. For evaluation of the content of the Directive, see, Brown (n 103) 204ff; Bell, *Racism and Equality in the European Union* (n 1) Chapter 4.
109 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.
110 For discussion of the differences between the directives, see e.g. L Waddington and M Bell, 'More Equal than Others: Distinguishing European Union Equality Directives' (2001) 38(3) *CMLRev* 587; D

In addition to these developments, the Presidency Conclusions of the Cologne European Council announced the intention to establish a Charter containing the fundamental rights applicable at Union level to 'make their overriding importance and relevance more visible to the Union's citizens'.[111] Despite the potential for the Charter to create many new instances of overlap,[112] the Charter did not gain binding force during this Phase. Postponing the potential complexities of norm overlap for several years, the Charter was merely 'solemnly proclaimed' by the European Parliament, Council of Ministers and European Commission at Nice on 7 December 2000.

3.5. Summary

To conclude, by the end of Phase II, two further instances of overlap had developed: a general principle prohibiting discrimination on grounds of nationality underscored the existing framework of primary and secondary law that developed during Phase I and a discrete overlap developed between secondary Union law relating to pregnant workers. Furthermore, changes to the Treaty framework – specifically the creation of Union citizenship – altered the context within which existing overlaps operated.

Two main themes emerge from the discussion. The first concerns the ambiguities that arise from the ECJ's tendency to derive general principles from written sources of EU law. The nature of general principles, the contours of which only become clear following judicial elaboration, mean that it is often not apparent whether they will play an autonomous role in the context of norm overlap. *P v S* showed that sometimes general principles will add to overlapping written provisions; however, whether the general principle prohibiting discrimination on grounds of nationality would provide any additional protection remained unclear by the end of this Phase. The second theme worth reflecting on is the role of the Union legislature and the Treaty-framers in both adding to and – at least in part – resolving issues of norm overlap. The overlap in relationship to pregnant workers suggests a lack of care on the part of the Union

Schiek, 'A New Framework on Equal Treatment of Persons in EC Law?' (2002) 8(2) *ELJ* 290; E Howard, 'The Case for a Considered Hierarchy of Discrimination Grounds in EU Law' (2006) 13(4) *MJ* 447.
[111] Council, 'Presidency Conclusions of the Cologne European Council on June 4 1999', Annex IV.
[112] Outlined in Section 5 below.

legislature to ensure the relationship between secondary measures is clear (or, indeed, that those measures do not coincide in the first place).

We turn to Phase III with a fundamentally different outline of EU equality law. A conception of non-discrimination as a human right sits alongside the notion of equal treatment as a market principle. The Treaty of Amsterdam adds new legislative bases (followed by new directives) and elevates the status of equality to an aim of the EU. Outside of the formal Treaty structure, there is also a non-binding Charter of Fundamental Rights. With these changes comes the potential for new overlaps to develop.

4. PHASE III: 2001-2009

During Phase III – from signing the Treaty of Nice to the entry into force of the Lisbon Treaty – we revisit much of the secondary law relating to nationality and sex discrimination adopted during Phase I. Characterising this Phase are attempts to consolidate and simplify existing secondary law, much of which had now been in force for several decades. Continuing from Phase II, the ECJ continues to battle with the relationship between general principles and overlapping written sources.

4.1. Nationality Discrimination: Recasting and Consolidating the Legislative Framework

Characterising the development of overlapping non-discrimination norms in Phase III is the consolidation of and addition to the legislative framework. Of particular note for present purposes are: (1) Directive 2004/38 consolidating the existing law on the rights of Union citizens to move and reside;[113] (2) Regulation 883/2004 overhauling the law on social security coordination;[114] and (3) Directive 2006/123 aiming to open up the market in services.[115] The measures are diverse, addressing very different aspects of free

[113] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77.
[114] Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166/1.
[115] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376/36.

movement, yet each – within varying parameters – grants Union citizens the right to equal treatment with nationals of a host Member State.

Directive 2004/38 aimed 'to codify and review' and to 'simplify and strengthen' the complex corpus of secondary law on the rights of workers, self-employed persons, students and the economically inactive.[116] In consequence, the Directive repealed several earlier free movement and residence measures[117] and amended Regulation 1612/68 (although the Directive left the equal treatment provisions of that Regulation – Articles 7 and 12 – untouched[118]). While the Directive mostly concerns the right to move and reside, Article 24 of Directive 2004/38 – found among the '[p]rovisions common to the right of residence' – includes a general prohibition on nationality discrimination. According to which:

> (1) Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens *residing on the basis of this Directive* in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty.[119] The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence (emphasis added).
>
> (2) By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate [to jobseekers][120] nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies…to persons other than workers, self-employed persons, persons who retain such status and members of their families.

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116 Recital 3.
117 Directive 68/360; Directive 73/148; Directive 90/364; Directive 90/365; Directive 93/96.
118 Regulation 1612/68 was later replaced by Regulation 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141/1. No changes are made to the equal treatment provisions aside from renumbering: Article 12 becomes Article 10.
119 Emphasis added. A Union citizen will be 'residing on the basis of' the Directive in the following circumstances: (1) during the first three months of residence (Article 6); beyond this, (2) if they are working or are self-employed (Article 7(1)(a)); (3) if they are economically inactive but have (or can attest to if they are students) sufficient resources as well as comprehensive sickness insurance (Article 7(1)(b)-(c)); or (4) if they are family members of a Union citizen satisfying any of the above (Article 7(1)(d)). Additionally, third country nationals accompanying or joining a Union citizen falling within one of the above categories will be able to benefit from the right to equal treatment (Article 7(2)).
120 According to Article 14(4)(b) a Union citizen who has entered the territory of the host Member State in order to seek employment and their family members 'may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.'

The breadth of Article 24 leads to new overlaps with all pre-existing norms prohibiting nationality discrimination mentioned so far. Furthermore, Article 24 of the Directive also overlaps with Articles 7 and 12 of Regulation 1612/68 since Union citizens working and living in a host Member State will be lawfully resident under the Directive.

In many ways the addition of a further non-discrimination norm created added complications. In particular, the Directive appears in tension with the Treaty-based rights to equal treatment it aimed to codify; for example, by requiring that Union citizens reside *on the basis of* the Directive or by permitting Member States to refuse jobseekers social assistance benefits.[121] Again, it falls to the ECJ to determine the inter-relationship between primary law and overlapping secondary measures, not to mention the general principle of non-discrimination.

Regulation 883/2004, designed to coordinate entitlement to and responsibility for social security across the EU, entered into force on the same day as Directive 2004/38. After 39 amendments to Regulation 1408/71, Regulation 883/2004 expressly aimed to replace, 'while modernising and simplifying', the existing rules on the coordination of social security systems.[122] Article 4 of Regulation 883/2004 grants 'persons to whom this Regulation applies' equal access to social security benefits[123] and special non-contributory benefits.[124] The persons covered by Regulation 883/2004 extend beyond

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[121] G Davies, 'Legislative Control of the European Court of Justice' (2014) 51(6) *CMLRev* 1579, 1600 and the references cited in n 92. For differing interpretations of Article 24(2) in relation to jobseekers see e.g. Joined Cases C-22/08 and C-23/08 *Vatsouras* EU:C:2009:344; Case C-67/14 *Alimanovic* EU:C:2015:597. A difference also emerges concerning the position of students. In *Bidar*, the ECJ accepted that a Union citizen could claim equal access to maintenance aid after three years of residence if they could evidence a 'certain degree of integration into the society' of the host Member State', see *Bidar* (n 86), paras 57, 62. However, the Directive requires five years of residence, a limit seemingly accepted in Case C-158/07 *Förster* EU:C:2008:630 even before the Directive had entered into force.

[122] Regulation 883/2004, Recital 3. Legislative overhaul was required due to the bifurcation of Member State welfare systems along two lines – social insurance and means tested systems – and the increasing privatisation of welfare, see M Fuchs and R Cornelissen, 'Introduction' in M Fuchs and R Cornelissen (eds), *EU Social Security Law: A Commentary on EU Regulations 883/2004 and 987/2009* (CH BECK/Hart/Nomos 2015) 1-18, para. 16.

[123] Social security benefits are listed in Article 3(1) and encompass (a) sickness benefits; (b) maternity and equivalent paternity benefits; (c) invalidity benefits; (d) old-age benefits; (e) survivors' benefits; (f) benefits in respect of accidents at work and occupational diseases; (g) death grants; (h) unemployment benefits; (i) pre-retirement benefits; (j) family benefits.

[124] Special non-contributory benefits share characteristics of both social security and social assistance. They were introduced in response to a number of decisions of the ECJ in which several non-contributory means-tested benefits were classed as 'social security' by Regulation 1247/92 of 30 April 1992 amending Regulation 1408/71 [1992] OJ L 136/1247/92. The rules on special non-contributory benefits are now found in Article 70 of Regulation 883/2004.

workers and the self-employed to include the economically inactive, i.e. 'nationals of a Member State … who are or have been subject to the legislation of one or more Member States' and their family members.[125] The expansive personal scope of the Regulation leads to overlaps with the Treaty provisions on the free movement of persons, Article 18 TFEU, Regulation 1612/68, *and* Directive 2004/38.

Notwithstanding the simplification aims of both Regulation 883/2004 and Directive 2004/38, and their concurrent drafting, the measures are at variance with one another. For example, Regulation 883/2004 deliberately extends equal treatment rights to the economically inactive;[126] so long as a Union citizen has been subject to the legislation of one or more Member States, they will be able to claim equal access to social security benefits and special non-contributory benefits in their Member State of residence[127] (defined as where their 'centre of interests' lies[128]). However, Article 24(2) of Directive 2004/38 allows Member States to deny applicants 'social assistance' during the first three months of residence. The coincidence between social assistance and special non-contributory benefits means that where Regulation 883/2004 grants Union citizens a right to equal treatment, Directive 2004/38 may permit Member States to refuse equal treatment. Again, the Union legislature leaves the ECJ to determine the priority between overlapping norms.

Directive 2006/123 on services in the internal market adds further equal treatment rights to the provisions outlined above. This Directive specifically addresses service providers and service recipients. As regards service providers, Directive 2006/123 specifies that 'Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which… [are] directly nor indirectly discriminatory with regard to nationality'.[129] In relation to service providers, the Directive requires that Member States 'ensure that the recipient is not made subject to discriminatory requirements based on his nationality or place of residence.'[130]

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125 Article 2(1).
126 Recital 42.
127 Article 11(3)(e).
128 Regulation 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems [2009] OJ L 284/1, Article 11(1).
129 Article 16(1)(a).
130 Article 20(1).

The prohibitions on nationality discrimination in Directive 2006/123 overlap with the Treaty rules on services as well as with Regulation 883/2004, which now extends the prohibition on discrimination to all EU citizens 'who are or have been subject to the legislation of one or more Member States'. Directive 2006/123 also overlaps with Directive 2004/38, which grants equal treatment to all persons residing lawfully on the basis of that Directive. As Directive 2004/38 grants a right of residence to all Union citizens during their first three months of residence in a host Member State, most service providers and recipients (who will most likely only stay in a host Member State for a short period of time) will be able to rely on Article 24 of that Directive. Tensions could arise if, for example, a recipient of services stayed in a host Member State for longer than three months. To be lawfully resident under Directive 2004/38 a service provider or service recipient would need sufficient resources and comprehensive health insurance.

In sum, during Phase III the Union legislature added several new overlapping norms prohibiting nationality discrimination. What is striking about the promulgation of so many secondary measures, each granting a right to equal treatment and each adopted so close in time to one another, is the lack of priority clauses specifying their inter-relationship. Despite the aims of simplification, many of the secondary norms adopted during this Phase led to tensions with overlapping Treaty-based and secondary law rights. By now, the intricacies of the multi-level prohibition on nationality discrimination should be evident as should the difficult choices facing the ECJ regarding how these different provisions should inter-relate. With each additional measure, the magnitude of the task facing the ECJ grows as does the archipelago of provisions prohibiting nationality discrimination.

4.2. Sex Discrimination: Amending the Legislative Framework

Several changes to secondary law prohibiting sex discrimination also occurred during this Phase. Over Phases I and II, the Union legislature adopted several directives each prohibiting discrimination in discrete areas such as pay, employment, social security and occupational social security. During this Phase, the Union legislature attempted to rationalise and extend this framework. In doing so, however, the Union legislature often

overlooked the potential for norm overlap and, more worryingly, for conflicts between overlapping norms.

The first development occurred in 2000 when the Commission proposed amending Directive 76/207 on equal treatment between men and women.[131] The resulting measure, Directive 2002/73,[132] defines direct and indirect discrimination,[133] widens discrimination to include harassment,[134] makes provision for positive action[135] and includes reference to pregnancy and maternity rights.[136] In defining indirect discrimination, the Directive appears to overrule the harmonised definition set out in Directive 97/80 on the burden of proof in cases of discrimination based on sex.[137] According to Directive 97/80, indirect discrimination occurs when 'an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex'.[138] Directive 2002/73 added a hypothetical element and specified that indirect discrimination covers measures *'would* put persons of one sex at a particular disadvantage compared with persons of the other sex'.[139] What makes the task of the ECJ so tortuous here is that Directive 2002/73 does not explicitly repeal – even in part – Directive 97/80. Altering a harmonised definition implicitly, and without wholesale reform, reflects negatively on EU legislative practice and evidences – yet again – the Union legislature's role in creating messy overlaps that the ECJ must then 'clean up'.

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131 Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions' (Explanatory Memorandum) COM(2000) 0334 final, para. 3.
132 Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [2002] OJ L 269/15.
133 Article 2(2).
134 Article 2(3).
135 Article 2(8).
136 Article 2(7).
137 Directive 97/80, Article 1(1)(a). The definition is harmonised across the following directives: Directive 75/117 on equal pay; Directive 76/207 on equal treatment; Directive 92/85 on the protection of pregnant workers; and Directive 97/81 on part-time work.
138 Article 2(2).
139 Article 2(2) (emphasis added).

Not long after Directive 2002/73, although after a 'lengthy and arduous process',[140] came Directive 2004/113 extending the prohibition on sex discrimination to the access to and the supply of goods and services.[141] The Directive, based on Article 19 TFEU, attempts to bring the law on sex discrimination further in line with Directives 2000/43 and 2000/78 (prohibiting discrimination on the basis of race and on the basis of religion or belief, disability, age or sexual orientation respectively). Directive 2004/113 applies:

> … to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context.[142]

As it extends the prohibition on discrimination to new fields, the Directive does not overlap with existing secondary law or Article 157 TFEU. However, the Directive creates a further overlap with the general principle prohibiting discrimination on grounds of sex.

Soon after adopting Directive 2002/73, the Commission began work on Directive 2006/54, which 'bring[s] together in a single text the main provisions existing in this field as well as certain developments arising out of the case-law of the [ECJ]'.[143] Directive 2006/54 does not consolidate all the aforementioned directives – developed in this Phase and in Phases I and II. The Directive replaces only the directives on pay, occupational social security and equal treatment.

Although Directive 2006/54 provided an opportunity to simplify the law relating to pregnant workers, it in fact adds to the intricacies of the law in this area. According to Directive 92/85 on the protection of pregnant workers, 'Member States shall take the

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[140] A Masselot, 'The State of Gender Equality Law in the European Union' (2007) 13(2) *ELJ* 152, 153. According to Masselot, '[a]lthough the actual legislative process only took over one year from the Commission's proposal on 5 November 2003 to the adoption of the Directive by the Council on 13 December 2004, the drafting of this legislation by the Commission had almost taken a year prior to the adoption of the proposal. A working draft proposal was leaked to the public in the summer of 2003, leading to some industries voicing their strong opposition. The Commission had then to re-draft a new proposal following consultation with the industry in question'.

[141] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L 373/37.

[142] Directive 2004/113, Article 3(1).

[143] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/23, Recital 1.

necessary measures to prohibit the dismissal of workers' during a worker's pregnancy and maternity leave. Offering seemingly greater protection for pregnant workers, Directive 2006/54 prohibits 'any less favourable treatment of a woman related to pregnancy or maternity leave'.[144] The Union legislature does here, at least, expressly require that Directive 2006/54 is 'without prejudice' to Directive 92/85.[145] The ECJ is left to determine whether it would prejudice the lesser protection offered under Directive 92/85 to allow an applicant to rely on Directive 2006/54 when pregnant and disadvantaged, but not dismissed.

The legislative framework underwent substantial alterations throughout Phase III. An expanded legislative framework sits below the general principle prohibiting discrimination on grounds of sex and Article 157 TFEU. One cannot help but criticise the Union legislature again here. Despite aiming to simplify the law in this area, the steps taken towards consolidating and expanding the law of sex discrimination was piecemeal and disjointed. As a result, Directive 2006/54 does not consolidate all the directives on sex discrimination; in particular, Directive 79/7 on equal treatment in social security remains outside the recast directive. Directive 2004/113, extending the prohibition on sex discrimination to the access to and the supply of goods and services, also remains outside the recast despite simultaneously working towards recasting existing directives alongside proposals to expand sex equality beyond employment.[146]

4.3. An Added Layer: The Development of New General Principles

In Phase II, the EU introduced two directives prohibiting status discrimination: Directive 2000/43 and Directive 2000/78. Adding an additional level of protection from discrimination, in Phase III the ECJ recognised that the anti-discrimination directives gave specific expression to a general principle prohibiting discrimination.

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144 Article 2(2)(c).
145 Article 28(2).
146 Commission, 'Options Paper on the simplification and improvement of legislation in the area of equal treatment between men and women' , <http://csdle.lex.unict.it/Archive/LW/Data reports and studies/Reports and communication from EU Commission/20110906-101840_Simplification_equality_leg_Jul03pdf.pdf> last accessed 26 August 2018. Commission, 'Proposal for a Council Directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services' COM(2003) 657 final.

The key development occurred in *Mangold*,[147] amidst an allegation of age discrimination between Mr Mangold and his employer. *Mangold* concerned the use of fixed-term contracts, which – according to German law – required objective justification, unless the worker had reached the age of fifty-two. Relying on this law, Mr Mangold (aged fifty-six) and his employer entered into a fixed-term employment contract. Mr Mangold then argued his contract of employment was incompatible with Directive 2000/78, which prohibits discrimination 'on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation'.[148] Agreeing with Mr Mangold, the ECJ concluded that the law on fixed-term contracts did constitute age discrimination.[149] However, two obstacles prevented Mr Mangold from successfully relying on Directive 2000/78. First, the deadline for transposing Directive 2000/78 had not yet passed.[150] Secondly, the dispute was between two private parties (directives lacking the capacity to have horizontal direct effect).

The ECJ surmounted both impediments by declaring that 'Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation.'[151] According to the ECJ, the Directive merely lays down a general framework for combatting discrimination whereas the source of 'the actual principle underlying the prohibition of those forms of discrimination… [is] in various international instruments and in the constitutional traditions common to the Member States.'[152] As a consequence, 'the principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law'.[153] The consequence is an overlap between Union secondary law – Directive 2000/78 – which prohibits age discrimination in the field of employment and self-employment[154] and a hierarchically superior general principle prohibiting discrimination on grounds of age.[155]

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147 Case C-144/04 *Mangold* EU:C:2005:709.
148 Article 1.
149 *Mangold* (n 147), paras 60-65.
150 *Mangold* (n 147), para. 28.
151 *Mangold* (n 147), para. 74.
152 *Mangold* (n 147), para. 74.
153 *Mangold* (n 147), para. 75.
154 Article 3.
155 It is axiomatic that Union secondary law can be reviewed for its compatibility with general principles, see e.g. Case 114/76 *Bela-Mühle* EU:C:1977:96, paras 5-8; Case 122/78 *Buitoni* EU:C:1979:43, para. 16ff; Case 224/82 *Meiko-Konservenfabrik* EU:C:1983:219, para. 11ff; Case C-309/89 *Codorniu v Council* EU:C:1994:197, para. 26ff; *Kadi* (n 53), paras 283-327.

Since the decision in *Mangold*, the ECJ has recognised other grounds of discrimination prohibited by the anti-discrimination directives as an expression of an overlapping general principles prohibiting discrimination. To date, the ECJ has recognised general principles prohibiting discrimination on grounds of sex,[156] race and ethnic origin,[157] religion[158] and sexual orientation.[159] The ECJ has not explicitly recognised a general principle of non-discrimination on grounds of disability but has referred to 'the general principle of non-discrimination' in such cases.[160]

What the ECJ did not clarify in *Mangold* was how the general principle prohibiting discrimination inter-relates with its written expression in Union secondary law. Semmelmann outlines three possible options. According to the first, the general principle is 'self-standing and independent' and so the 'material, personal and temporal scope … flow from the principle itself.'[161] On this understanding, the limitations on the applicability of the anti-discrimination directives – for example, Directive 2000/78 only applies in the fields of employment and occupation – will not determine the scope of the general principle. Option two is termed a 'combination reading' where the general principle is 'enforceable in combination with more concrete rules'.[162] This approach implies that the general principle will mostly serve as an aid to interpretation of overlapping secondary law but may – as in *Mangold* – operate to extend the possible application of secondary law.[163] The final option, '[a]bsolute deference to the legislature', implies that:

> As soon as there is secondary legislation that covers the same subject matter as the respective general principle, recourse to the general principle is no longer required or even possible; the principle does not openly serve as an aid to interpretation nor does it determine the personal, material or temporal scope of the protected interest.

156 *Defrenne III* (n 64), paras 26-27.
157 *CHEZ Razpredelenie Bulgaria* (n 97), para. 58.
158 Case 130/75 *Prais* EU:C:1976:142, para. 10.
159 Case C-147/08 *Römer* EU:C:2011:286, para. 60. Although the ECJ only refers to the 'the principle of non-discrimination on the ground of sexual orientation'.
160 Case C-354/13 *FOA* EU:C:2014:2463, para. 32
161 C Semmelmann, 'General Principles in EU Law between a Compensatory Role and an Intrinsic Value' (2013) 19(4) *ELJ* 458, 464.
162 Semmelmann (n 161) 465.
163 In *Mangold* (n 147), the situation fell outside the temporal scope of Directive 2000/78.

> The hierarchy of norms becomes visible only when there is judicial review of legislation.[164]

The role of the ECJ in recognising and developing general principles means that their meaning will be closely bound to their interaction with written expressions of the same right.

4.4. Summary

The main driver behind increasing occurrences of norm overlap in Phase III was an attempt to consolidate and simplify existing secondary law. These legislative developments not only failed to remove existing tensions, but also added to them. The ECJ also played a part in the development of overlaps, which is evident when one considers the recognition of general principles prohibiting discrimination apparently inspired by yet then detached from existing secondary law.

5. PHASE IV: 2009-2018

From the perspective of norm overlap, the main legal innovation in Phase IV is the entry into force of the Charter of Fundamental Rights. According to Article 6 TEU:

> 1. The Union recognises the rights, freedoms and principles set out in the Charter…which shall have the same legal value as the Treaties …
>
> 2. The Union shall accede to the [ECHR] …
>
> 3. Fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Until the EU accedes to the ECHR,[165] there are therefore two legally binding sources of EU fundamental rights protection: the Charter and the general principles of Union law.

The aim of the Charter was to 'strengthen' and make 'more visible'[166] existing rights in the EU and so the Charter text includes several non-discrimination norms. As a result, the Charter creates overlaps with most of the norms discussed so far. Title III of the

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[164] Semmelmann (n 161) 465.
[165] The EU has not yet acceded to the ECHR and accession looks unlikely following Opinion 2/13 *Accession of the EU to the ECHR* EU:C:2014:2454. The ECHR still remains important for fundamental rights protection in the EU in two ways: (1) as an inspirational source for general principles and (2) as a minimum standard for the interpretation of Charter rights (see Articles 52(3) and 53 CFR).
[166] Preamble, Recital 4.

Charter relating to 'Equality' contains several provisions prohibiting discrimination. For present purposes there are three key provisions.[167] First, Article 20 CFR enshrines the general principle of equal treatment[168] and specifies that '[e]veryone is equal before the law'. Secondly, Article 21(1) CFR sets out the prohibition on status discrimination and prohibits:

> Any discrimination based on any ground such as sex,[169] race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation…

Thirdly, Article 21(2) CFR stipulates that 'within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.'[170]

The entry into force of the Charter creates new overlaps and new complications. In particular, the Charter has a distinct framework for both the realisation and limitation of non-discrimination rights when compared with pre-existing sources. Article 51(1) CFR governs the field of application of the Charter and provides that the Charter is 'addressed… to the Member States only when they are implementing Union law'. Article 52(1) CFR sets out the legality of any restrictions to rights protected:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

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[167] In addition, Articles 22-26 CFR aim to enhance the rights of minorities or vulnerable persons. Specifically mentioned are cultural, religious and linguistic diversity; equality between men and women; the rights of the child; the rights of the elderly; and the integration of persons with disabilities. Overlaps with these provisions fall outside the scope of this thesis since they relate to equality in the substantive sense.

[168] See Section 2.2 above.

[169] Additionally, Articles 23 CFR concerns equality – in the substantive sense – between men and women and Article 33(2) CFR relate to that 'everyone shall have the right to protection from dismissal for a reason connected with maternity'.

[170] The prohibition on nationality discrimination is additionally protected in two further Charter rights: Article 15(2) CFR grants Union citizens 'the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State' while Article 34(2) provides that '[e]veryone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.'

Later Chapters discuss the distinction between these provisions and the corresponding rules for applying and limiting rights under the Treaties and general principles in more detail.

For present purposes, it suffices to touch upon the inter-relationship between the Charter and existing prohibitions on non-discrimination. To begin with, where the Charter overlaps with Union secondary law, there is a clear relationship of hierarchy. Article 52(1) CFR, cited above, sets the 'limits on limits' and so determines the legality of any restrictions introduced by Union secondary law. Chapter 3 further discusses this issue.

When it comes to overlaps with provisions of the Treaty – such as Article 157 TFEU on equal pay and Article 18 TFEU prohibiting nationality discrimination – there is no relationship of hierarchy set out in Article 6(1) TEU.[171] Article 52(2) CFR instead governs the inter-relationship between overlapping provisions and specifies that the '[r]ights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.' Relatedly, Article 51(2) CFR provides that the 'Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.' *Prima facie*, the combined effect of Articles 51(2) and 52(2) CFR suggests that where that Charter rights duplicate rights found in the Treaties, the Charter will be of little 'added value'. Chapter 4 revisits this interpretation of Article 52(2) CFR.

Article 6 TEU also leaves open the inter-relationship between the Charter and the general principles it codifies. Article 6 TEU reaffirms the existence of general principles alongside the Charter but does not set out a hierarchy between sources. Nor does Article 6 TEU differentiate between possible effects of different sources e.g. 'that the

[171] Rossi notes that 'it has even been suggested that [the Charter] could gain constitutional status, on the reasoning [that it] enshrines the Union's fundamental principles and some general legal principles-such as *ne bis in idem*. If it received constitutional status, the Charter would have precedence or primacy over the Treaty', see LS Rossi, 'Same Legal Value as the Treaties: Rank, Primacy, and Direct Effects of the EU Charter of Fundamental Rights' (2017) 18(4) *GLJ* 771, 772.

Charter may give rise to rights but general principles may not',[172] leaving how overlapping sources of fundamental rights inter-relate the ECJ.[173] The key question here is whether general principles prohibiting discrimination might continue to apply alongside the Charter. This question is not merely academic and may be of importance if, for example, overlapping general principles offer a higher standard of protection. Chapter 6 returns to these questions.

6. CONCLUDING REMARKS

The picture left by this Chapter should be of a vast and messily overlapping array of non-discrimination norms. The non-discrimination framework started as a few instrumental and economic-oriented provisions in the EEC Treaty and developed into a complex multi-layered framework. Just in the field of non-discrimination alone the sheer number of overlaps suggests that norm overlap is of such a scale that it can no longer be overlooked.

What the chronological analysis carried out above shows is that there are three main causes of norm overlap attributable to the different actors involved in creating and developing EU law. First, some responsibility falls on the Union legislature for failing to set out how overlapping secondary norms should work together. Secondly, the inspirational use of written sources of EU law for developing new general principles creates overlaps without any clear sense of whether and or how the general principle adds to the written framework. Thirdly, the highly substantive nature of the EU Treaties leads to overlaps with any secondary law seeking to give substance to broad Treaty rights and with several Charter rights.

One actor alone could not remove all instances of norm overlap and overlap is sometimes unavoidable such as where secondary law implements primary rights. We are to some extent stuck with norm overlap and so attention turns to the ECJ as the actor

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[172] T Tridimas, 'Fundamental rights, general principles of EU law, and the Charter' (2014) 16 *CYELS* 361, 377.

[173] HH Hofmann and BC Mihaescu, 'The Relation between the Charter's Fundamental Rights and the Unwritten General Principles: Good Administration as the Test Case' (2013) 9 *EuConst* 73, 74. Hofmann and Mihaescu go further arguing that Article 6 TEU evidences 'the intention of the constitutional legislator to confer on the EU courts the power to act as the arbiter between the different and – on occasion – competing or overlapping sources of fundamental rights' (81).

responsible for interpreting the relationship between these different layers. Chapter 2 now turns to set out the importance of the ECJ's interpretative choices here and introduces how existing priority principles might guide the ECJ when faced with overlapping norms. Several of the specific overlaps discussed in this Chapter are returned to in Chapters 3-6 where different case studies allow for a detailed examination of the ECJ's approach.

Chapter Two

Existing Approaches to Norm Inter-Relationship

1. INTRODUCTION

Chapter 1 showed the development of a vast array of non-discrimination norms that variously accumulate and conflict. In this Chapter, the focus shifts from the various actors involved in norm-development to the ECJ as the actor responsible for 'ensur[ing] that in the interpretation and application of the Treaties the law is observed.'[1] When more than one norm prohibiting discrimination might apply it falls to the ECJ to determine several related questions, such as: which norm should form the starting point of any analysis; should the ECJ interpret one norm in light of the other; and, when push comes to shove, which should the ECJ prioritise? How the ECJ answers these questions is the focus of later Chapters. Before embarking on more detailed case law analysis, this Chapter sets out the existing tools and legal principles that might guide the ECJ in its task.

To start with, this Chapter offers some context and explains why the investigation undertaken by this thesis is of crucial importance. Section 2 shows how the ECJ's approach to the inter-relationship between overlapping norms can lead to consequences that go beyond the outcome in an individual case. This Chapter emphasises four different constitutional values potentially impacted upon by the ECJ's chosen solution to norm overlap: the protection of fundamental rights, the balance of power between the EU and the Member States, the principle of institutional balance and the principle of legal certainty. This is not to say these are the only consequences of the ECJ's approach to the relationship between overlapping norms. The choice to dwell on these four variables reflects the combined impetus of their fundamental status within the EU legal order and their liability to be acutely affected by the ECJ's approach to norm overlap (as

[1] Article 19(1) TEU.

the case law analysis undertaken for this thesis revealed). The conclusion reached by this Section is that decisions about norm interactions cannot be arbitrary but instead require a principled basis.

Having established the constitutional weight that attaches to how the ECJ determines the relationship between overlapping norms, Section 3 outlines the existing principles and tools the ECJ could rely on to structure this determination. Drawing on principles developed in domestic legal systems and in the context of international law, Section 3 sets out the potential relevance of priority clauses and the principles of *lex superior, lex specialis* and *lex posterior* – prioritising, respectively, whichever norm is the hierarchically superior, the more specific or the later in time – in the context of norm overlaps. The overall argument is that these principles offer practical guidance to the ECJ when faced with norm overlap. Later Chapters examine whether the ECJ adopts these principles in practice.

2. CONSTITUTIONAL SIGNIFICANCE

2.1. Overview

Why should the inter-relationship between overlapping norms concern EU lawyers? Some initial scepticism is perhaps understandable here given that overlapping norms are, by definition, similar. However, as explained in the Introduction to this thesis, for norms to overlap there is no need for norms to be identical; overlapping norms can originate from different formal sources of Union law and compliance with one norm may lead to the breach of an overlapping norm (i.e. they conflict). Not only is the upshot of these divergences that the inter-relationship between overlapping norms can alter the outcome of proceedings, the ECJ's interpretative choices can have significant constitutional consequences.

2.2. The Protection of Fundamental rights

The ways in which overlapping norms inter-relate potentially impacts on fundamental rights protection in two ways. First, on a more individual level, the ECJ's approach can affect whether an applicant can avail themselves of the protections of Union law due to

divergences between norms. Broude and Shany demonstrate this possibility in terms of 'judicial borrowing'. As they explain:

> … if both international human rights law and international humanitarian law include an obligation to minimize civilian casualties during armed conflicts, but only the former provides individuals who were harmed with effective remedies, one might expect gradual attempts to apply human rights norms also in dispute settlement proceedings relating to armed conflict situations, thereby putting the traditional equilibrium between the rights and obligations of the parties to armed conflicts under increased pressure.[2]

What their example makes clear is the interpretative choice that materialises when more than one norm is *prima facie* applicable and one of those norms offers greater protection for the individual.

Chapter 1 indicated some of the differences that persist between overlapping non-discrimination norms in EU law. One norm may have a broader personal or material scope, another norm may have the capacity to apply horizontally, and yet another norm may permit limitations on additional grounds. The prohibition on status discrimination in the Charter (Article 21(1) CFR) is, for example, wider than many overlapping secondary norms since it applies throughout the scope of application of Union law.[3] Similarly, Directive 2006/54[4] (on equal treatment between men and women) offers more extensive protection from discrimination on grounds of pregnancy[5] than the overlapping directive relating to pregnant workers.[6] How the ECJ combines different sources of the prohibition on discrimination – and, in particular, whether the ECJ prioritises the norm granting greater protection – determines the level of protection granted under EU non-discrimination law. As further outlined below, this potential impact on the result in individual cases strongly implies the need for the ECJ to justify

[2] T Broude and Y Shany, 'The International Law and Policy of Multi-Sourced Equivalent Norms' in T Broude and Y Shany (eds), *Mutli-Sourced Equivalent Norms in International Law* (Hart 2011) 1-15, 10.
[3] Discussed above in Chapter 1, Section 5 and below in Chapter 3, Section 3.
[4] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/23.
[5] Discrimination on grounds of sex includes discrimination on grounds of pregnancy, see Case C-177/88 *Dekker* EU:C:1990:383, para. 12.
[6] Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers who have recently given birth or are breastfeeding [1992] OJ L 348/1. Discussed in Chapter 1, Section 3.3.

its interpretative choices concerning norm overlap and to ensure coherence; otherwise, a decision to prioritise the narrower norm could attract allegations of arbitrariness.

Less tangibly, how the ECJ interprets the inter-relationship between overlapping norms may also undermine the status of fundamental rights protection within the EU. Before explaining this point further, let us first reflect briefly on the stated importance of fundamental rights within the EU legal order. Following the gradual expansion[7] and formalisation[8] of the EU's commitment to fundamental rights, the Treaties now bestow fundamental rights, alongside the principle of equal treatment, with foundational status: according to Article 2 TEU, the EU is '*founded on* the values of respect for human dignity … equality … and respect for human rights' (emphasis added).[9] Reflecting this avowed importance, Article 6 TEU sets out three distinct sources of EU fundamental rights: the EU Charter of Fundamental Rights, the ECHR,[10] and the general principles of Union law.[11] The current Treaty framework thus strongly implies the protection of fundamental rights is a central tenet of the EU's constitutional order. Given the case study adopted by this thesis, the special significance of the principle of equality also warrants mention. Eliminating discrimination is one of the EU's express policy goals; consistent with Article 3(3) TEU, the internal market should aim to 'combat social exclusion and discrimination, and … promote social justice and protection [and]

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[7] Following the recognition that 'respect for fundamental rights forms an integral part of the general principles of Community law protected by the Court of Justice' in Case 11/70 *Internationale Handelsgesellschaft* EU:C:1970:114, para. 3, the ECJ expanded the catalogue of fundamental rights protected as general principles and their scope of application. In *Wachauf*, the ECJ held that general principles apply to the Member State when they are 'implementing' Union law, see Case 5/88 *Wachauf* EU:C:1989:321, para. 19. In *ERT*, the ECJ held that general principles apply to acts of the Member States that fall 'within the scope' of EU law, see Case C-260/89 *ERT* EU:C:1991:254, para. 42.

[8] Alongside the development of general principles, the Treaty-framers cemented respect for fundamental rights in primary law; for example, Treaty amendments at Maastricht explicitly recognised that fundamental rights form part of EU law (now Article 6 TEU), while the Treaty of Amsterdam made compliance with fundamental rights part of the formal criteria for accession to the EU (now Article 49 TFEU), introduced a 'sanctioning mechanism' against violations of fundamental rights by the Member States (now Article 7 TEU), and conferred upon the EU the competences to promote human rights (now Articles 19, 157(3) TFEU). The turning point came with the European Council's decision to 'establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens' (Council 'Presidency Conclusions of the Cologne European Council' June 4 1999).

[9] The Preamble to the Charter also sets out how 'the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law' (Recital 2).

[10] Article 6(2) TEU obliges the EU to accede to the ECHR, although when this will happen is unclear following Opinion 2/13 *Accession of the EU to the ECHR* EU:C:2014:2454.

[11] Article 6(3) TEU reaffirms that '[f]undamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'.

equality between women and men'. In all of its actions, the EU must strive 'to eliminate inequalities, and to promote equality, between men and women'[12] and 'to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'[13]

Turning now to the possible implications of the ECJ's approach to norm inter-relationship for fundamental rights protection. How the ECJ prioritises (or does not prioritise) the Charter of Fundamental Rights and general principles can damage the avowedly integral nature of fundamental rights to the EU legal order. If, for example, the ECJ were systematically to subjugate Charter rights to overlapping secondary Union law or Treaty provisions, this might contradict the stated importance of fundamental rights to the EU as well as the express aim of the Charter to 'strengthen the protection of fundamental rights'.[14] Over time, consistently applying the norm offering lesser protection might undermine the notion that the EU is founded upon respect for human rights. While this does not mean that the ECJ should always resolve norm overlaps in a way that secures the maximum level of fundamental rights protection,[15] the EU's constitutional commitment to fundamental rights should infuse the ECJ's interpretative choices here.

2.3. Balance of Powers between the EU and the Member States

The inter-relationship between overlapping norms may also impact upon the delicate balance of powers between the EU and the Member States. One of the characteristics of the EU is that it is a body of limited powers. Initially motivating the creation of (what is now) the EU was the predicted advantages that would follow from pooling decision-making in certain spheres. As the ECJ recognised in *Van Gend en Loos*, the Member States 'limited their sovereign rights, albeit in limited fields' to achieve certain goals.[16] To this day the EU remains based on this idea; the EU possesses the competences conferred upon it by the Member States and any 'competences not conferred upon the

[12] Article 8 TEU.
[13] Article 10 TEU.
[14] Preamble, Recital 4.
[15] For an argument to this effect in the context of the inter-relationship between the Charter and general principles, see HH Hofmann and BC Mihaescu, 'The Relation between the Charter's Fundamental Rights and the Unwritten General Principles: Good Administration as the Test Case' (2013) 9 *EuConst* 73.
[16] Case 26/62 *Van Gend en Loos* EU:C:1963:1; [1963] ECR 1, 12.

Union in the Treaties remain with the Member States.'[17] The functional allocation of powers between the supranational (EU) level and the national (Member State) level means the EU is akin to a federal system with 'divided sovereignty [that] is guaranteed by the national or supranational constitution and umpired by the supreme court of the common legal order.'[18] Crucial here is the power of the ECJ – as 'umpire' – 'to strike the appropriate balance'[19] between the EU and the Member States. As a corollary of this power, when the ECJ determines the inter-relationship between overlapping norms, it's interpretative choices may impact the balance of powers between the EU and the Member States.

What makes the ECJ's approach to norm overlap so crucial is that maintaining a balance between the powers of the EU and of the Member States is key to the proper functioning of the EU. First, it enables 'proper political accountability within States (because the Union affects their internal balances of power) and the appropriate allocation of that political accountability between the Union and the States (so that citizens know who is responsible for what).'[20] Secondly, maintaining balance ensures that decisions are taken as closely as possible to those affected and so can thereby better 'reflect the interests of the population concerned … [and] enhance the individual's sense of dignity and autonomy within the larger community.'[21]

Reflecting the fundamental importance of ensuring the balance of powers, the Treaties include several mechanisms to prevent over-centralisation and the encroachment of the EU on national prerogatives. The principles of conferral and subsidiarity govern the existence and exercise of the EU's powers. According to the former, 'the Union shall act only within the limits of the competences conferred upon it by the Member States',[22]

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[17] Article 4(1) TEU.
[18] K Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38(2) *American Journal of Comparative Law* 205, 263.
[19] Lenaerts (n 18) 205. As Lenaerts outlines, 'the Court of Justice does not pronounce on the division of powers between the [EU] and the Member States by way of a simple definition of the powers granted to the [EU] as opposed to those which remain for the Member States. Its jurisprudence should rather be characterized as a continuum delineating the *specific powers* of the [EU] and possibly the *implied powers* linked to them, the *non-specific powers* of the [EU] and, finally, as a "leftover category", the residual powers of the Member States', see Lenaerts (n 18) 216-17 (emphasis in original).
[20] Case C-58/08 *Vodafone and Others* EU:C:2009:596, Opinion of Advocate General Maduro, para. 1.
[21] G Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' [1994] *Columbia Law Review* 331, 340.
[22] Article 5(2) TEU.

while the latter specifies that the Union shall only exercise its competence 'if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States … but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.'[23] Further emphasising the limited nature of the EU's powers, the Lisbon Treaty added a catalogue of Union competences (specifying whether those competences are exclusive, shared or complementary)[24] and includes an express guarantee to safeguard the national identity of the Member States, including 'their fundamental structures, political and constitutional, inclusive of regional and local self-government.'[25] The Treaties are also replete with references to the limited nature of Union competence: Article 6(1) TEU clarifies that the entry into force of the Charter 'shall not extend in any way the competences of the Union as defined in the Treaties';[26] similarly, Article 51(2) CFR states that '[t]he Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.' The unavoidable message is that '*the bounds of the scope of EU law are strict; they should correspond strictly to the competences attributed to the EU*.'[27]

Despite the emphasis in the Treaties on conferral and the limits of Union competences, a tension arises in practice due to the asymmetry between the Union's competences and what falls within the scope of application of Union law. Even in areas falling outside the competences of the Union, where Member States retain power, national measures must still comply with the Treaties. In the words of the ECJ:

> Whilst it is not in dispute that EU law does not detract from the powers of the Member States the power of the Member States [recognized in particular in the areas of direct taxation, social protection, education, attribution of nationality, civil status of persons], the fact remains that, when exercising those powers, the Member States must comply with EU law.[28]

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[23] Article 5(3) TEU. The Treaty of Lisbon introduced a new role for national parliaments in monitoring respect for subsidiarity, see Articles 12 and 69 TEU and Protocol (No 2) on the application of the principles of subsidiarity and proportionality.
[24] Articles 4-6 TFEU.
[25] Article 4(2) TEU.
[26] See also e.g. Articles 3(6) and 6(2) TEU.
[27] L Azoulai, 'The 'Retained Powers' Formula in the Case Law of the European Court of Justice: EU law as Total Law?' (2011) 4 *EJLS* 192, 196 (emphasis in original).
[28] Case C-73/08 *Bressol* EU:C:2010:181, para. 28 as cited by Azoulai (n 27) 194.

To illustrate this point, consider a national rule restricting the sale of foreign lottery tickets; the Member States retain the power to regulate lotteries, however, the national rule must still comply with the free movement rules.[29] The role of the ECJ in determining the balance of powers between the EU and the Member States becomes palpable here. Part and parcel of the ECJ's responsibility to interpret and apply the Treaties is the power to determine the outer boundaries of the Treaties;[30] a broad interpretation of – to take examples from Chapter 1 – the free movement rules or the meaning of 'pay' under Article 157 TFEU will directly impact on the freedom of Member States.

In some ways, how the inter-relationship between overlapping norms impacts the balance of powers is the inverse of its potential impact on fundamental rights protection. A decision by the ECJ to prioritise a broader norm that grants more extensive protection from discrimination will inevitably restrict a Member State's room for manoeuvre. When the ECJ faces questions about interactions with primary Union law, there exists a greater potential impact on the balance of powers. The constitutionalisation of the Treaties via the doctrines of direct effect and supremacy,[31] combined with the fact that the ECJ is the only institution responsible for interpreting the Treaties,[32] means that interpretations of the Treaty 'effectively *become* the Treaty'.[33] Powers lost to the Union can be difficult to retrieve. This is significant given that the 'internal market … social policy … [and] economic, social and territorial cohesion' are all areas of shared competence.[34]

Where the ECJ's approach to the inter-relationship between overlapping norms is most likely to upset the balance of powers is where an overlap arises with what Davies terms a 'purposive power' i.e. powers defined in terms of an overarching aim.[35] Chapter 1 set

[29] This example is borrowed from G de Búrca, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor' (1998) 36(2) *JCMS* 217, 221.
[30] Article 19(1) TEU.
[31] *Van Gend en Loos* (n 16) 12; Case 6/64 *Costa v ENEL* EU:C:1964:66.
[32] Article 19(1) TEU.
[33] G Davies, 'Legislative Control of the European Court of Justice' (2014) 51(6) *CMLRev* 1579, 1584 (emphasis in original). See further, Protocol No 2 on Article 157 TFEU, which marked an attempt by the Member States to impose their own understanding of Article 157 TFEU.
[34] Articles 2(2)(a)-(c) TFEU.
[35] G Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2015) 21(1) *ELJ* 2, 2.

out the two-pronged system for abolishing nationality discrimination in the Treaties. The first prong consists of directly effective Treaty rights to free movement. Article 45 TFEU, for example, states that '[f]reedom of movement for workers shall be secured within the Union'. The second prong consists of secondary law adopted to e.g. 'bring about freedom of movement for workers, as defined in Article 45'.[36] In the context of an overlap between Article 45 TFEU and secondary Union law giving more specific expression to that right, how the ECJ determines the inter-relationship between those norms is crucial for the balance of powers. Any limits contained in that secondary law need not influence the ECJ's interpretation of Article 45 TFEU; furthermore, any obstacle to intra-EU movement, even if not prohibited by secondary law, could still fall foul of the overlapping Treaty provision. [37]

The cross-cutting nature of EU fundamental rights also means that when overlaps arise with the Charter or with general principles, how the ECJ determines their role can further limit the retained powers of the Member States. Particularly worrisome here is the ECJ's tendency, as outlined in Chapter 1, to utilise written sources of Union law as an inspirational source of general principles. In so doing, the ECJ entrenches secondary Union law, making it difficult for Member States to overturn. The ECJ also further limits Member State discretion since general principles bind the Member States in all situations falling within the scope of EU law. As Lenaerts and Gutiérrez Fons explain:

> Vertically, the application of general principles may displace long-standing legal traditions at odds with the constitutional foundations of the Union. Even in areas where the Union does not enjoy legislative competence as such, the joint application of the substantive law of the Union and of general principles may force the national legislature to accommodate its policy choices to EU law. Stated differently, where a national measure falls within the scope of EU law, general principles may "circumscribe" (or "frame") the powers retained by the Member States.[38]

Where a written norm prohibits discrimination in one specific sector, the recognition of an overlapping general principle may thus curtail Member State powers in additional areas.

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[36] Article 46 TFEU. See also Article 48 TFEU.
[37] Davies 'Democracy and Legitimacy in the Shadow of Purposive Competence' (n 35) 3.
[38] J Gutiérrez-Fons and K Lenaerts, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47(6) *CMLRev* 1629, 1629.

2.4. Respect for Institutional Balance

How the ECJ determines the inter-relationship between overlapping norms can also impact the horizontal distribution of powers under the Treaties and may fall foul of the requirement to 'practice mutual sincere cooperation' between institutions.[39] The role of the ECJ, to ensure 'that in the interpretation and application of the Treaties the law is observed',[40] entails the responsibility to resolve norm interactions. In how it does so, though, lies the potential for the ECJ to act outside its allocated role.

According to Article 13(2) TEU, '[e]ach institution shall act within the limits of the powers conferred on it in the Treaties'.[41] More concretely, this obligation means that one institution 'cannot deprive the other institutions of a prerogative granted to them by the treaties themselves'.[42] Expanding further on what respect for institutional balance implies, the ECJ in *Chernobyl* held that 'each of the institutions must exercise its powers with *due regard* for the powers of the other institutions' (emphasis added).[43] When exercising its interpretative function, the ECJ – sitting among the Union's institutions[44] – should ensure 'due regard' for the powers of the Union legislature and not deprive the Union legislature of the powers allocated to that institution (as variously configured) by the Treaties.

The practical implications of the obligation under Article 13(2) TEU (i.e. what upsets institutional balance) are not easy to decipher and defining the boundary between the role of the ECJ and the Union legislature is particularly tricky. When listing the EU's institutions, Article 16(1) TEU attributes legislative functions jointly to the European Parliament and the Council[45] and designates the role of the ECJ as ensuring 'that in the

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[39] Article 13(2) TEU.
[40] Article 19(1) TEU.
[41] AG Trstenjak considers that the allocation of powers according to function rather than according to the classic conception of the separation of powers (with distinct legislative, executive and judicial branches) reflects the differing powers and composition of the Union institutions. In her view, 'the [EU's] functions are intended to be exercised by the organs which are best placed to perform them under the Treaties … to ensure that the [EU's] aims are effectively achieved', see Case C-101/08 *Audiolux and Others* EU:C:2009:410, Opinion of AG Trstenjak, para. 104.
[42] Case 149/85 *Wybot* EU:C:1986:310, para. 23.
[43] Case C-70/88 *Parliament v Council (Chernobyl)* EU:C:1990:217, para. 22.
[44] Article 13(1) TEU. See further, G de Búrca, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor' (1998) 36(2) *JCMS* 217.
[45] Articles 14(1) and 16(1) TEU.

interpretation and application of the Treaties the law is observed'.[46] What makes the appropriate divide difficult here is that there is a certain degree of overlap between the roles of the Union legislature and the ECJ. Where legislative bases sit alongside directly effective Treaty provisions, the role of each institution coincides in practice. For example, alongside Article 157(1) TFEU on the principle of equal pay between men and women is a legislative basis – Article 157(3) TFEU – allocating to the Union legislature the power to 'adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women'. The hierarchical superiority of the Treaties means that interpretation of Article 157 TFEU will to some extent impact on the prerogatives of the Union legislature under Article 157(3) TFEU to decide how best to go about the same policy goal. The ECJ goes beyond the limits of its institutional prerogatives, though, when it substitutes its own decisions for those of the Union legislature.[47]

When interpreting the meaning of Article 157 TFEU and its relationship with overlapping secondary law, there are three essentially three different approaches open to the ECJ.[48] By relying on primary law the ECJ could (1) annul overlapping secondary law; (2) emasculate the legislative measure via interpretation; or (3) avoid the Union secondary law by recognising a directly effective Treaty right that operates in parallel. The Treaties specifically grant the ECJ the power to render secondary Union law null or invalid.[49] Annulling secondary Union law does not necessarily violate the distribution of powers. The ECJ is more likely to violate the horizontal distribution of powers if it adopts options (2) or (3). If secondary Union law is not incomplete and is not in breach of higher Union law, it surely encroaches upon the powers of the Union legislature to alter the decisions it has reached. The aim here is not to cast doubt on the hierarchy of norms, but to shed light on how the ECJ's interpretative choices concerning overlap can

[46] Article 19(1) TEU.
[47] K Lenaerts and A Verhoeven, 'Institutional Balance as a Guarantee for Democracy in EU Governance' in C Joerges and R Dehousse (eds), *Good Governance in Europe's Integrated Market* (OUP 2002) 35-88, 45.
[48] Davies, 'Legislative Control of the European Court of Justice' (n 33) 1591. In a similar vein, Syrpis classifies case law on the relationship between primary and secondary law into those cases: (1) in which primary law 'trumps' secondary law; (2) in which primary and secondary law are interpreted neutrally; and (3) in which secondary law 'takes priority over' primary law, see P Syrpis, 'The Relationship between Primary and Secondary Law in the EU' (2015) 52(2) *CMLRev* 461, 465.
[49] Articles 263 and 267 TFEU.

affect the prerogatives of the Union legislature and to offer some reflections on where the somewhat elusive division of EU institutional powers might lie.

It is not only when Treaty rights overlap with Union secondary law that the ECJ's interpretative choices regarding norm inter-relationship can impact on institutional balance. The ECJ's interpretative choices concerning the inter-relationship between primary norms might, for instance, impact upon the scope of the Union's functional legislative competences under Articles 114 and 352 TFEU.[50] Similarly, how the ECJ combines and prioritises overlapping secondary Union law can undo or remake legislative choices.[51]

As noted above, Article 13(2) TEU also enshrines the requirement for institutions to 'practice mutual sincere cooperation'. Horsley argues this provision obliges the ECJ to be sensitive to legislative choices and 'to engage in a more constructive process of inter-institutional policymaking with the Union legislature.'[52] At a minimum, therefore, the obligation of mutual sincere cooperation demands that the ECJ acknowledges the policy choices of the EU's political institutions and justifies any decisions that impact significantly upon the solutions adopted by the Union legislature. In the context of overlap, this would seem to require a sensitivity to different outcomes that might result from the ECJ's interpretation of the inter-relationship between norms.

2.5. The Principle of Legal Certainty

The preceding discussion highlighted how the ECJ's approach to norm overlaps can have practical implications for applicants and can determine whether an applicant is able to avail themselves of the right to non-discrimination protected by EU law. If the ECJ prioritises overlapping norms differently in similar cases, the outcome of a case may be difficult to predict.

If the ECJ consistently fails to resolve the inter-relationship between overlapping norms in the same way or according to certain guidelines, negative repercussions potentially

[50] See M Dougan, 'Legal Developments' (2010) 48(1) *JCMS* 164, 165.
[51] See Chapter 5.
[52] T Horsley, 'Reflections on the Role of the Court of Justice as the "Motor" of European Integration: Legal Limits to Judicial Lawmaking' (2013) 50(4) *CMLRev* 931, 933.

result from the perspective of legal certainty. According to the principle of legal certainty – a principle that forms part of the rule of law, which is one of the foundational principles of the EU[53] – a rules should be 'clear, precise and predictable in their effect, especially when they may have adverse consequences on individuals and undertakings'.[54] More precisely, the ECJ considers that '[i]ndividuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly.'[55] Satisfying the requirements of legal certainty thus requires clearly articulated and consistently applied guiding principles that determine the inter-relationship between overlapping norms.

2.6. The Need for a Principled Approach

The conclusion to be drawn here is that how the ECJ manages overlapping norms can have negative ramifications for the EU legal order. There is nothing new in observing the constitutional implications of ECJ case law. Previously un(der-)acknowledged, though, are the specific implications that can follow from how the ECJ interprets the relationship between overlapping norms. Depending on the type of overlap – i.e. whether overlap arises between norms of the same formal source, or between norms of differing hierarchical status – the repercussions may differ. Overlaps between the Charter and other norms of Union law are more likely to impact the importance of fundamental rights within the EU legal system, while overlaps between higher-ranking norms and secondary Union law will likely have a greater impact on the allocation of powers under the Treaties.

Necessitating further comment are the tensions inherent between these different constitutional concerns. To some extent, each of the constitutional concerns outlined above pull in differing directions. Resolving norm overlaps in a manner that expands the

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[53] Article 2 TEU. In addition, ECJ case law repeatedly affirms that the EU is based upon the rule of law, see e.g. Case 294/83 *Les Verts v Parliament* EU:C:1986:166, para. 23; Case C-50/00 P *Unión de Pequeños Agricultores v Council* EU:C:2002:462, para. 38; Joined Cases C-402/05 P and C-415/05 P *Kadi v Council and Commission* EU:C:2008:461, para. 281; Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* EU:C:2013:625, para. 91; Case C-362/14 *Schrems* EU:C:2015:650, para. 60.

[54] Case C-342/14 *X-Steuerberatungsgesellschaft* EU:C:2015:827, para. 59. See also e.g. Case C-147/13 *Spain v Council* EU:C:2015:299, para. 79; Case C-48/14 *Parliament v Council* EU:C:2015:91, para. 45; Case C-49/16 *Unibet International* EU:C:2017:491, para. 43; Case C-322/16 *Global Starnet* EU:C:2017:985, para. 46; Case C-158/07 *Förster* EU:C:2008:630, para. 67,

[55] Case C-345/06 *Heinrich* EU:C:2009:140, para. 45.

scope of protection from discrimination offered by Union law will also alter the horizontal and vertical distribution of powers. Equally, articulating rules or principles governing norm interactions may lead to greater legal certainty but may not always secure the greatest possible level of rights protection. There will also be a difficult balance between competing constitutional values. This thesis does not prioritise one above the other. Any approach to norm overlap articulated by the ECJ should, however, recognise these potential implications.

Bridging to the next Section (and the remaining Chapters), the constitutional weight attaching to ECJ decisions when it interprets the relationship between overlapping norms necessitates more than simply justifying interpretative choices in the immediate case. The need for predictability as a part of the requirements of legal certainty and the possibility of alternately justifying decisions in the light of competing constitutional values demand a more principled approach. The following Section introduces several existing tools and principles for resolving questions of norm inter-relationship. The main contention is that these principles, with minor modifications for the specificities of both norm overlap and the EU legal system, provide workable and normatively justified guidelines for determining the relationship between overlapping norms.

3. EXISTING SOLUTIONS

3.1. Overview

This Section turns to examine the existing legal tools and principles that the ECJ could employ when determining the inter-relationship between overlapping norms. Specifically, this Section sets out the guidance offered by priority clauses and priority principles (i.e., the principles of *lex superior, lex specialis* and *lex posterior*) in the context of norm overlap, highlighting both the efficacy and the limits of each approach. Later Chapters examine whether the ECJ does in fact follow the guidance offered by these principles.

3.2. Priority Clauses

For drafters (of treaties, legislation, etc.) to include a priority clause, they must foresee the potential for coincidence with other norms. Priority clauses[56] offer an *ex ante* solution to questions of norm inter-relationship by either giving precedence to or subjugating one norm. A basic categorisation includes: (1) clauses providing for the priority of the containing norm (i.e. the provision of EU law in which the priority clause is located); (2) clauses assigning priority to another norm (and setting out the subsidiary nature of the containing norm); and (3) clauses granting priority on a case-by-case basis to the norm offering greater advantages e.g. more extensive protection of human rights.[57] Each type of clause pre-determines how norms should inter-relate.

The use of priority clauses is a technique employed by both the Treaty-framers and the Union legislature to mediate the relationship between provisions. In EU law, priority clauses regulate the relationship between the EU Treaties and external Treaties,[58] between provisions of the EU Treaties,[59] between the Charter and other sources of fundamental rights,[60] and between measures of secondary Union law.[61] The most commonly used priority clauses in EU law specify that the containing norm is either 'without prejudice' to or 'shall not affect'[62] another norm (or several). The prohibition on nationality discrimination in Article 18 TFEU is, for instance, 'without prejudice to

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[56] This thesis adopts the term 'priority clause' to reflect the utility of such clauses outside of conflicts between norms. Other labels include 'compatibility clauses' (W Czapliński and G Danilenko, 'Conflicts of Norms in International Law' (1990) 21 *Netherlands Yearbook of International Law* 3, 13) and 'conflict clauses' (JB Mus, 'Conflicts between Treaties in International Law' (1998) 45(2) *Netherlands International Law Review* 208, 214; D Pulkowski, *The Law and Politics of International Regime Conflict* (OUP 2014) 319).

[57] Compiled based on H Blix and JH Emerson, *The Treaty Maker's Handbook* (Oceana Publications 1973) 210-22; Czapliński and Danilenko (n 56) 13; Mus (n 56) 214; ILC, 'Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*' (13 April 2006) UN Doc A/CN.4/L.682 ('Fragmentation Report'), para. 268; CJ Borgen, 'Treaty Conflicts and Normative Fragmentation' in DB Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 448-471, 457; Pulkowski (n 56) 319-21.

[58] E.g. Article 351 TFEU.

[59] E.g. Article 38 TEU; Articles 16, 18 22(2), 25, 55, 57, 218 TFEU.

[60] Articles 52(2)-(4) CFR.

[61] Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [2002] OJ L 269/15, Article 7 (mediating that Directive's inter-relationship with Directive 92/85/EEC).

[62] See e.g. Article 266 TFEU; Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376/36, Article 23(3).

any special provisions' in the Treaties.[63] An example of a 'shall not affect' clause is Article 36(2) of Regulation 492/2011 on the free movement of workers, which states that it 'shall not affect measures taken in accordance with Article 48 [TFEU].'[64] 'Without prejudice' and 'shall not affect' clauses fall within the secondary category outlined above and explicitly subordinate the containing norm.

The horizontal provisions of the Charter are also priority clauses – even if they do not fit so neatly within the categorisation set out above – because they set out its relationship with some other sources of human rights. Article 52(2) CFR comes closest to the traditional understanding of priority clauses and specifies that '[r]ights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.' Articles 52(3) and 52(4) CFR do not determine priority as such, but they do set out where the content of one norm will dictate or influence the meaning of corresponding Charter rights. Article 52(3) CFR states that 'so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the [ECHR]', although it does not prevent the Charter from offering more extensive protection. Similarly, Article 52(4) CFR sets out the relationship between Charter provisions and national constitutional traditions by requiring the interpretation of the Charter 'in harmony with those traditions.'

Discussion now turns to the presumed meaning of 'without prejudice' and 'shall not affect' clauses in the context of norm overlap.[65] Respect for express clauses is a corollary of the ECJ's responsibility (discussed above) to 'ensure that in the interpretation and application of the Treaties the law is observed'[66] as well as the requirement of mutual sincere cooperation between institutions.[67] Linking back to Section 2, if the ECJ ignores,

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[63] See also e.g. Directive 2006/123, Article 18. For further discussion of the 'without prejudice' clause in Article 18 TFEU, see Chapter 4, Section 2.
[64] Regulation 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141/1, Article 36(2). For further discussion of the 'shall not affect' clause in Regulation 492/2011, see Chapter 5.
[65] Later Chapters discuss the import of the horizontal provisions in the Charter and how, in practice, they mediate relationships with overlapping norms. On Article 52(2) CFR, see: Chapter 3, Section 3; Chapter 4, Sections 3; and Chapter 6, Section, 3.1. On Article 52(4) CFR, see Chapter 6, Section 3.1.
[66] Article 19(1) TEU.
[67] Article 13(2) TEU.

overrules or otherwise limits the operation of a priority clause it might act *ultra vires* its own competences (especially if the clause is included with the Treaties) or encroach on the prerogatives of the Union legislature to determine the interactions between measures.

If overlapping norms conflict, scholarship advances two different understandings of what 'without prejudice' and 'shall not affect' clauses imply.[68] One understanding suggests that these clauses require only a separate interpretation of the relevant norms:[69] each norm is on a distinct path and cannot alter ('affect' or 'prejudice') the interpretation of the other. A consequence of this understanding is that neither clause offers any help in determining the relationship between applicable norms. Which norm ought to apply is then, if anything, only more complicated and makes recourse to priority principles necessary (on which see below). The other interpretation of 'without prejudice' and 'shall not affect' clauses is that they subjugate the norm they are part of below the conflicting (and prioritised) norm. This understanding is the more persuasive since it provides a resolution to norm conflicts and best fits the interpretation of such clauses in international law i.e. as meaning that one 'treaty will take priority over another treaty or not in the event that a conflict occurs'.[70] In theory, when overlapping norms conflict, 'shall not affect' and 'without prejudice' clauses pre-empt the application of the containing norm (without invalidating that norm[71]) and require the application of the prioritised norm.

What do the terms 'affect' and 'prejudice' imply in the context of overlap leading to accumulation (and not conflict)? Their meaning is somewhat more ambiguous in this context. Envisage, for example, two norms prohibiting discrimination on grounds of sexual orientation. The first is a general prohibition that expressly 'shall not affect' the second norm, which prohibits discrimination on grounds of sexual orientation in

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[68] And are evident in practice: contrast Case C-35/97 *Commission v France* EU:C:1998:431, para. 44 with Case C-287/05 *Hendrix* EU:C:2007:196, Opinion of AG Kokott, para. 54. For further discussion see Chapter 5, Section 5.

[69] *Hendrix,* Opinion of AG Kokott (n 68), para. 54. Cousins also refers to 'shall not affect' clauses as 'somewhat slender evidence' for granting priority to another norm, see M Cousins, 'Free Movement of Workers, EU Citizenship and Access to Social Advantages' (2007) 14(4) *MJ* 343, 350.

[70] Mus (n 56) 214. See also A Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*' (2005) 74(1) *NJIL* 27, 40.

[71] Czapliński and Danilenko (n 56) 14.

relation to: (1) access to employment; (2) pay; and (3) working conditions. Where an ambiguity arises is over the intended meaning of the latter norm. By specifying three areas covered by that norm, did the drafters aim to define exhaustively those situations in which discrimination on grounds of sexual orientation is prohibited; or did the drafters simply aim to set out how that provision applies more specifically in certain situations. If an applicant seeks to contest discriminatory conduct that does not concern access to employment, pay and working conditions, does the 'shall not affect' clause prevent reliance on the more general prohibition? If we assume that the legislature restricted the material scope of the employment-specific norm for a reason, then the broader norm potentially 'affects' the envisaged scope of the prohibition on discrimination. However, such assumptions imply intentions to the Union legislature that are not express and go against the general approach to legal reasoning adopted by the ECJ.

Discussion returns to how the ECJ interprets priority clauses in Chapter 4 on the inter-relationship between primary norms and, to a lesser extent, in Chapter 5 on the inter-relationship between overlapping secondary norms.

3.3. Priority Principles

In the absence of a priority clause, scholarship concerning public international law and national law lists three traditionally-accepted principles for resolving questions of norm inter-relationship:[72] the *lex superior* principle, the *lex specialis* principle and the *lex posterior* principle (according priority between norms based on rank, specificity and date respectively).

[72] According to e.g. CW Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 *BYIL* 401, 436; M Hirsch, 'Interactions Between Investment and Non-investment Obligations' in P Muchlinski, F Ortino and C Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 154-181, 160; R Michaels and J Pauwelyn, 'Conflict of Norms or Conflict of Laws: Different Techniques in the Fragmentation of Public International Law' (2011-2012) 22(3) *Duke Journal of Comparative & International Law* 349, 354. Other principles of interpretation do exist, although they are not relevant to the context of norm overlap in EU law. The principle of *lex prior,* for example, requires that 'if there is a conflict between two treaties made with two different States, the earlier treaty prevails', see Jenks (n 72) 442. *Lex prior* only applies to agreements signed with third parties e.g. if parties A and B sign a treaty and then A signs a treaty with C, A is still bound to the treaty with B. Other principles mentioned by Jenks – although not widely recognised – include the autonomous operation principle, the 'pith and substance' principle and the legislative intention principle, see further Jenks (n 72) 448.

Before exploring what guidance each principle offers in the context of norm overlap, let us first dwell on the choice to examine the relevance of priority principles in this thesis despite – as discussed below – the ECJ rarely mentioning them explicitly. One potential criticism is that the principles of *lex superior*, *lex specialis* and *lex posterior* are only relevant to norm conflicts. This argument struggles, in part, because norm overlap encompasses norm conflicts; priority principles should, therefore, at least be of *some* assistance to the ECJ even if only when conflicts arise between overlapping norms. What is more, any argument that confines the relevance of priority principles to conflict resolution misunderstands their more general role as part of legal reasoning. As further discussed below, the principles of *lex superior*, *lex specialis* and *lex posterior* largely draw attention to the justifications for competing choices between norms.[73] Ascertaining the more specific or later norm is often a way of identifying the most precise or most recent expression of legislative intent, while identifying the superior norm ensures the structure of the legal system around certain fundamental principles. This systemic role of priority principles means that it is misguided to treat the principles of *lex superior*, *lex specialis* and *lex posterior* as conflict rules requiring 'mechanical application'.[74] Instead, they are interpretative maxims forming part of legal reasoning that can assist in the determination of the inter-relationship between norms more generally.[75]

A different possible objection is to question the status of priority principles in EU law. The Treaties do not explicitly refer to the principles of *lex superior*, *lex specialis* and *lex posterior*[76] and these principles are not found among the general principles of Union law.

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[73] G Conway, *The Limits of Legal Reasoning and the European Court of Justice* (CUP 2012) 89.
[74] Pulkowski (n 56) 322.
[75] See e.g. Jenks (n 72) 407 (who argues that priority principles do not have 'absolute validity … [but] must be weighed and reconciled in the light of the circumstances of the particular case'); ILC, 'Fragmentation Report' (n 57) para. 27 (describing priority principles as part of 'pragmatic process through which lawyers go about interpreting and applying formal law'); Conway (n 73) 19 (who treats priority principles as part of the 'typology of aspects of legal reasoning'); Pulkowski (n 56) 322 n20 (who concludes that '[p]riority rules are essentially tools within the legal order that allow the interpreter to justify her decision according to rational criteria); S Borelli, 'The (Mis)-Use of General Principles of Law: Lex Specialis and the Relationship Between International Human Rights Law and the Laws of Armed Conflict' in L Pineschi (ed), *General Principles of Law – The Role of the Judiciary* (Springer 2015) 265-293, 266 (referring to priority principles as 'general principle[s] of legal reasoning'). Academic literature also singles out principle of *lex specialis* 'as an informal part of legal reasoning, that is of the pragmatic process through which lawyers go about interpreting and applying formal law' and as 'a technique which directs the attention of decision-makers to a more appropriate regulation', Lindroos (n 70) 36.
[76] An exception here is the principle of *lex superior,* which is implicit in Article 263 TFEU requiring that the ECJ 'review the legality of legislative acts … on grounds of … infringement of the Treaties or any rule of law relating to their application'.

As a result, their legal status in EU law is unclear.[77] However, in line with the idea that priority principles form part of legal reasoning more generally, this thesis does not understand the ECJ as *legally obliged* to respect these principles. The more limited contention is that they provide workable and generally accepted (outside of EU law) interpretative guidelines for resolving questions of norm inter-relationship. These principles therefore offer a starting point for assessing ECJ practice since, as noted above, structuring norm inter-relationship in line with hierarchical superiority, specificity or date is often a proxy for normative concerns such as legislative intent that will in any case inform judicial reasoning. As such they offer a logical point of departure and a way into the case law of the ECJ, which often lacks detailed justification[78] and rarely lays down interpretative maxims.[79]

Discussion now turns to analyse each of these principles in more detail.

3.3.1 *Lex Superior*

Where there is hierarchy between norms, the principle of *lex superior* – granting priority to the higher-ranking norm – is *prima facie* applicable.[80] There are differing rationales for the principle of *lex superior*. Underpinning the principle of *lex superior* in many instances will be a concern for democracy. A hierarchy between acts should reflect 'the democratic legitimacy of their respective authors and adoption procedures'.[81] The EU Treaties are, for example, hierarchically superior to secondary Union law on account of their ratification by each Member State of the EU. Similarly, this explains the hierarchy

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[77] Even in international law a debate persists regarding 'whether priority rules are best classified as general principles of international law, rules of interpretation, customary international law or something completely different', see Pulkowski (n 56) 322, n 20. For an extensive overview, see E Vranes, 'Lex Superior, Lex Specialis, Lex Posterior – Zur Rechtsnatur der "Konfliktlösungsregeln"' (2005) 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 391, 392.

[78] Tridimas refers to the ECJ's reasoning as 'laconic, terse, succinct, even, sibylline', see T Tridimas, 'The Court of Justice and Judicial Activism' 21(3) *ELRev* 199, 210, while Perju describes it as 'overly abstract, vague, and elliptical', see V Perju, 'Reason and Authority in the European Court of Justice' (2009) 49 *Virginia Journal of International Law* 307, 310.

[79] When drawing a contrast with the Appellate Body of the WTO, Ehlermann once reflected that he could not remember the ECJ '[laying] down openly and clearly the rules of interpretation that it intended to follow', see CD Ehlermann, 'Some Personal Experiences as Member of the Appellate Body of the WTO' (2002) Robert Schuman Centre Policy Paper No. 02/9, para. 43.

[80] Michaels and Pauwelyn (n 72) 354.

[81] K Lenaerts and M Desomer, 'Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures' (2005) 11(6) *ELJ* 744, 745.

between legislative and non-legislative acts given the participation of democratic institutions in promulgating the former. The principle of *lex superior* also reflects other normative concerns such as the principle of attributed powers and the protection of certain fundamental principles. Where one norm forms the legal basis for another, the principle of *lex superior* requires that the former norm remains within the parameters of the empowering norm. In this way, the *lex superior* principle reflects a concern for competence.[82] The principle of *lex superior* also ensures 'that norms are adopted and remain within the scope of the fundamental principles of a given legal order.'[83] For example, constitutions often entrench basic rights and freedoms such as equality and the protection of minorities.

The principle of *lex superior* developed in the context of domestic legal systems where a hierarchy exists between, primarily, the constitution and legislation; but also, between other sources (e.g. in the UK a hierarchy exists between statute and common law). Following a reinterpretation of the principle to fit the non-hierarchical nature of international law,[84] the principle of *lex superior* also applies where one norm is recognised as superior on the grounds of its fundamentality or normative import and not just its formal source. In international law, a norm of general international law contrary to *jus cogens*[85] – i.e. a norm 'that admit[s] no derogation and that can be amended only by a new general norm of international law of the same value'[86] – will be invalid. The notion of a hierarchy based on normativity and not just on formal source has also altered the

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[82] N Bobbio, 'Des critères pour résoudre les antinomies' (1964) 18(1/4) *Dialectica* 237, 254.
[83] R Bieber and I Salome, 'Hierarchy of norms in European Law' (1996) 33(5) *CMLRev* 907, 910.
[84] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1946 UKTS 67 ('ICJ Statute'), Article 38 does not set out an *a priori* hierarchy between the different sources of international law: treaty, custom and general principles. The notion that one norm of international law is not hierarchically superior to another on the grounds of the actor creating the norm or the procedure adopted is widespread see e.g. M Akehurst, 'The Hierarchy of the Sources of International Law' (1976) 47(1) *BYIL* 273, 274; Czapliński and Danilenko (n 56) 7; J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (CUP 2003) 94-97.
[85] On which see, e.g., JA Carrillo Salcedo, 'Reflections on the Existence of a Hierarchy of Norms in International Law' (1997) 8(4) *EJIL* 583; Pauwelyn (n 84) 21; D Shelton, 'Normative Hierarchy in International Law' (2006) 100(2) *AJIL* 291; Hirsch (n 72) 157; J Vidmar, 'Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?' in E de Wet and J Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (OUP 2012) 13-42; D Shelton, 'International Law and "Relative Normativity"' in MD Evans (ed), *International law* (4th edn, OUP 2014) 138-165. The Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 ('VCLT'), Article 53 confirms the superiority of norms of *jus cogens* over other norms of international law.
[86] Shelton, 'Normative Hierarchy in International Law' (n 85) 297.

understanding of the *lex superior* principle in the domestic context. In the UK, for instance, judges recognise a hierarchy between statutes that grant precedence to so-called 'constitutional statutes'[87] on the grounds of their normative importance to the UK's constitutional settlement.[88]

Turning to the potential guidance offered by the *lex superior* principle in the context of overlap in EU law, a basic precondition is the existence of a hierarchy. A hierarchy exists between some (although not all) formal sources of Union law. Sitting above secondary Union law are the Treaties, the Charter and the general principles of EU law. Recognising their hierarchical superiority, Article 263 TFEU empowers the ECJ to 'review the legality of legislative acts … on grounds of … infringement of the Treaties or any rule of law relating to their application' in an action brought by a Member State, the European Parliament, the Council or the Commission.[89] A hierarchy also exists between different acts of the EU;[90] at the top are legislative acts,[91] followed by delegated acts[92] and then implementing acts.[93]

No normative hierarchy, akin to the notion of *jus cogens*, appears to exist in EU law. The closest the ECJ came to endorsing the idea of a 'higher law' was in its ruling in *Kadi* that 'no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order.'[94] While Rosas and Armati interpret the

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[87] According to Laws LJ (who first developed the notion of 'constitutional statutes'): 'a constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights. (a) and (b) are of necessity closely related: it is difficult to think of an instance of (a) that is not also an instance of (b) … Ordinary statutes may be impliedly repealed. Constitutional statutes may not' (*Thoburn v Sunderland City Council* [2002] EWHC 195, [2003] QB 151, [62]-[63], per Laws LJ). The UK Supreme Court later confirmed the existence of constitutional statutes in *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324.

[88] On the normative importance of constitutional statutes, see e.g. P Craig, 'Constitutionalising Constitutional Law: *HS2*' [2014] *PL* 373, 389; F Ahmed and A Perry, 'Constitutional Statutes' (2016) 37(2) *OJLS* 461, 467.

[89] The ECJ relies, *inter alia,* on the reference to 'any rule of law relating to their application' to justify the development of general principles. See e.g. T Hartley, *The Foundations of European Union Law* (8th edn, OUP 2014) 146.

[90] See further P Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (OUP 2011) 57-66. H Hofmann, 'Legislation, Delegation and Implementation Under the Treaty of Lisbon: Typology Meets Reality' (2009) 15(4) *ELJ* 482; D Curtin and T Manucharyan, 'Legal Acts and Hierarchy of Norms in EU Law' in D Chalmers and A Arnull (eds), *The Oxford Handbook of European Union Law* (OUP 2015) 103-25.

[91] Article 289 TFEU.

[92] Article 290 TFEU.

[93] Article 291 TFEU.

[94] *Kadi* (n 53), para. 304.

ECJ's decision in *Kadi*, as 'confirm[ing] and ma[king] more explicit a tendency discernible in previous case-law according to which the EU constitutional order consists of some core principles which may prevail over provisions of the Treaties and thus of written primary law'[95] theirs is a lone voice. No later cases contain similar references to the notion that fundamental rights might prevail over the Treaties.

Given the absence of a normative hierarchy in Union law, the principle of *lex superior* will not be of use where norms have the same or an equal-ranking formal source. The Treaties and the Charter have the same status[96] as do the different legislative acts: regulations, directives and decisions.[97] The contested rank of general principles is also problematises the application of the principle of *lex superior* to the inter-relationship between general principles and written primary law. Some academic literature accords general principles parity with the Treaty and the Charter and refers to general principles as 'constitutional'[98] and as 'primary law'.[99] On this view, the principle of *lex superior* is of little help. Sometimes general principles are even recognised as superior to the constitutive Treaties.[100] Craig and de Búrca, however, explicitly recognise general principles as falling below primary law and refer to general principles as the 'second tier of the hierarchy of norms'.[101] Even on this view the relevance of hierarchy is unclear since the ECJ cannot review the general principles of Union law for their compatibility with the Treaties and/or Charter.

The guidance offered by the *lex superior* principle will differ depending upon the (ir)reconcilability of overlapping norms. Even where a conflict arises, the *lex superior* principle does not require (although it does not prohibit) the mechanical application of the hierarchically superior norm. In many cases, relying directly on the inferior norm will make good sense from the perspective of the EU's constitutional values. First,

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[95] A Rosas and L Armati, *EU Constitutional Law: An Introduction* (2nd edn, Hart 2012) 43.
[96] Article 6(1) TEU. Article 52(2) CFR governs the relationship Treaties and the Charter. For further discussion see Chapter 4.
[97] Article 289(3) TFEU.
[98] See Case C-101/08 *Audiolux and Others* EU:C:2009:626, para. 63.
[99] See *Audiolux and Others* Opinion of AG Trstenjak (n 41), para. 70; Rosas and Armati (n 95) 56; K Lenaerts and others, *European Union law* (3rd edn, Sweet & Maxwell/Thomson Reuters 2011).
[100] AG Toth, 'Human Rights as General Principles of Law, in the Past and in the Future' in B Ulf and J Nergelius (eds), *General Principles of European Community Law: Reports from a Conference in Malmo, 27-28 August 1999* (Kluwer Law International 2000) 73-92, 78.
[101] P Craig and G de Búrca, *EU Law: Text, Cases, and Materials* (5th edn, OUP 2011) 109.

where an overlap exists between primary and secondary Union law, it makes sense to begin with the 'more specific instrument'[102] that 'offer[s] structure, detail and certainty'.[103] Secondly, relying on Union secondary law as a starting point better respects the principle of mutual sincere cooperation between institutions[104] by requiring the ECJ to begin its analysis with the Union legislature's interpretation of a particular right. Thirdly, starting with the lower-ranking norm best fits with the idea that higher-ranking norms act as a check on their legality. Finally, interpreting *lex superior* as a rule requiring the application of the hierarchically superior rule ignores the possibility – particularly in the context of rights – that Union secondary norms might *expand* on primary norms. Applying the hierarchically superior norm would therefore be to apply the norm of more limited scope.

Where overlapping norms conflict, the *lex superior* principle requires that the higher-ranking norm prevails. As the ECJ ruled in *Wirtschaftsvereinigung Stahl*, 'an individual measure which is contrary to a general measure of higher rank in the hierarchy of norms is inevitably unlawful.'[105] In this sense, the *lex superior* principle is closely connected to the EU system of strong judicial review[106] under which the ECJ can annul or invalidate secondary Union law (under Articles 263 and 267 TFEU respectively) 'on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.'[107] Under the *lex superior* principle, where the scope of secondary law is narrower than that of overlapping primary law, the primary norm should prevail.

However, the broad wording of EU primary law and the lack of specificity inherent in the general principles of Union law make it difficult to determine when primary law should take precedence; could a higher-ranking norm not always be interpreted as having a wider scope than overlapping secondary law? The standards developed by the ECJ for identifying a breach of the Treaties perhaps offer better guidance here as to

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[102] Case C-143/16 *Abercrombie & Fitch Italia* EU:C:2017:235, Opinion of AG Bobek, para. 21.
[103] P Syrpis, 'Theorising the Relationship between the Judiciary and the Legislature in the EU Internal Market' in P Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (CUP 2012) 3-24, 7.
[104] Article 13(2) TEU.
[105] Case C-441/97 P *Wirtschaftsvereinigung Stahl* EU:C:2000:643, para. 32
[106] The phrase 'strong judicial review' comes from J Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346.
[107] Article 263 TFEU.

when the ECJ ought to give precedence to the primary law norm. According to the ECJ, when the adoption of secondary Union law requires the legislature to make 'political, economic and social choices … [and] to undertake complex assessments … the legality of a measure adopted in that area can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue'.[108] Where secondary Union law impinges upon fundamental rights protection, the ECJ requires more anxious scrutiny and will ensure 'the review, in principle the full review, of the lawfulness of all [EU] acts in the light of the fundamental rights' protected as general principles of Union law and enshrined in the Charter.[109] The standard of review for the legality of Union acts fleshes out the *lex superior* principle here.

There is, however, one sense in which the *lex superior* principle is ill-suited for resolving conflicts between overlapping norms. Where secondary law offers more extensive protection from discrimination than the overlapping primary law, a conflict will most likely emerge. For example, to repurpose the example employed in the introduction, consider a primary law norm that on Saturdays I must jog 10 km in the park and another a secondary law norm that requires me to jog 20 km. The cross-cutting legal bases in EU law will sometimes empower the Union legislature to add to existing obligations and, so long as the Union legislature did not exceed its competences (or otherwise act unlawfully), the validity of such a measure will not be called into question. Something of a tension emerges here between the dictates of the *lex superior* principle and the outcome of legality review. On the assumption that the *lex superior* principle requires the higher-ranking norm to take precedence in the context of a norm conflict, this would mean that lower-ranking norms cannot expand upon higher-ranking norms. As such, applying the principle of *lex superior* in the event of a conflict between overlapping norms may sometimes lead to illogical consequences. In the context of norm conflict, the principle of *lex superior* is perhaps better subsumed by legality review.

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[108] Joined Cases C-453/03 and C-11-12, 194/04 *ABNA and Others* EU:C:2005:741, para. 69. See also, e.g. Case C-84/94 *UK v Council (Working Time)* EU:C:1996:431, para. 58; Case C-233/94 *Germany v Parliament and Council (Deposit guarantee directive)* EU:C:1997:231, paras 55-56; Case C-210/03 *Swedish Match* EU:C:2004:802, para. 48; Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* EU:C:2005:449, para. 52; Case C-549/15 *E.ON Biofor Sverige* EU:C:2017:490, para. 50.
[109] *Kadi* (n 53), para. 326.

Outside of its role in judicial review, the principle of *lex superior* acts more as a more systemic principle[110] and addresses two main interpretative maxims to the ECJ. First, as Syrpis notes, 'the adoption of secondary legislation should not affect the way in which primary law is interpreted.'[111] The only exception is the so-called '*Tedeschi* principle'; according to this principle, where overlapping secondary law intends to harmonise a particular area, recourse to primary law is only possible to assess the validity of secondary Union law.[112] Second, when interpreting Union secondary law 'preference must be given as far as possible to the interpretation which renders it compatible with the Treaty and the general principles of law.'[113] In this way, the principle of *lex superior* ensures coherence in the legal order by ensuring the interpretation of lower-ranking norms in light of hierarchically superior norms that supposedly enshrine fundamental principles.

Finally, the principle of *lex superior* takes precedence over the principles of *lex specialis* and *lex posterior*.[114] Furthermore, it follows from the hierarchy of norms that a secondary law norm cannot purport to take precedence over a hierarchically superior norm. Matters are more complicated when it comes to the relationship between the principle of *lex superior* and priority clauses, for example, where primary law explicitly subjugates itself to a lower-ranking norm. The issue remains somewhat unresolved. Article 21(1) TFEU specifies that '[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect' thereby creating what Syrpis terms a 'normative inversion'.[115]

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110 Conway (n 73)155.
111 Syrpis 'The Relationship between Primary and Secondary Law in the EU' (n 48) 461.
112 See Case 5/77 *Tedeschi* EU:C:1977:144, para. 35; Case C-37/92 *Vanacker* EU:C:1993:836, para. 9; Case C-324/99 *DaimlerChrysler* EU:C:2001:682, para. 32; Case C-309/02 *Radlberger Getränkegesellschaft and S. Spitz* EU:C:2004:799, para. 53; Case C-321/05 *Kofoed* EU:C:2007:408, Opinion of AG Kokott, para. 67.
113 T Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006) 29. See also Case C-314/89 *Rauh* EU:C:1991:143, para. 17; Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* EU:C:2009:716, para. 48.
114 Michaels and Pauwelyn (n 72) 354. See also, Bobbio (n 82) 355, who argues that, although in theory the principle of *lex superior* should take precedence over the principles of *lex specialis* and *lex superior*, in practice the demands of justice may mean granting precedence to the more specific norm.
115 Syrpis, 'The Relationship between Primary and Secondary Law in the EU' (n 48) 473.

The guidance offered by the *lex superior* principle in the context of specific overlaps and whether ECJ practice concurs with this approach will be examined further in later Chapters. In particular, the role played by the *lex superior* principle in the context of norm overlap will be examined further in Chapter 3 (on the inter-relationship between overlapping primary and secondary Union law) and in Chapter 6 (on the inter-relationship between the Charter and overlapping general principles).

3.3.2 *Lex Specialis*

In the absence of a hierarchy between norms, ruling out the utility of the *lex superior* principle, the generally accepted method for determining norm inter-relationship is to prioritise whichever norm is more specific (the principle of *lex specialis)* or whichever is later in time (the principle of *lex posterior*). No hierarchy exists between the principles of *lex specialis* and *lex posterior*. Instead, judges must decide 'contextually as to whether the degree of speciality or the time of emergence of the norm is more important'.[116]

The principle of *lex specialis* grants priority to whichever norm is more specific.[117] Underpinning this principle are two main rationales. First, the more specific norm is said to reflect the intentions of the legislature better; the assumption is that a lawmaker, 'in regulating a specific area, wants to create special rules that trump the general rules in the field.'[118] Even if one agrees with Milanovic that it is a 'fiction' that the legislature 'could not possibly have intended to legislate two hierarchically equal norms that are ultimately contradictory',[119] there is a second reason for respecting the principle of *lex specialis*: 'specific rules are presumed to be particularly efficacious'.[120] The greater efficacy

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[116] ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Conclusions' (18 July 2006) UN Doc A/CN.4/L.702 ('Fragmentation Report Conclusions') 9. See also Pulkowski (n 56) 322-23.
[117] See generally H Grotius, *The Rights of War and Peace* (Liberty Fund 2005) Bk. 2, Ch. XVI, sXXIX; E de Vattel, *The Law of Nations or Principles of the Law of Nature*, vol 2 (Sweet, Stevens and Maxwell 1834) Ch. XVII, para. 316; Jenks (n 72) 446; G Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points' (1957) 33 *BYIL* 203, 236; Czapliński and Danilenko (n 56) 20; Michaels and Pauwelyn (n 72) 354; G Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2012) 222; B Simma and D Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17(3) *EJIL* 483, 287.
[118] Michaels and Pauwelyn (n 72) 354. See also Pauwelyn (n 84) 388; Lindroos (n 70) 42.
[119] M Milanovic, 'The Lost Origins of *Lex Specialis*: Rethinking the Relationship between Human Rights and International Humanitarian Law' in JD Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (CUP 2016) 78-117, 109.
[120] Pulkowski (n 56) 324.

of the more specialised norm stems from its greater precision and the fact that it admits fewer exceptions.[121]

The ECJ recognises and applies the principle of *lex specialis*[122] and so it is possible to extrapolate from existing case law how the *lex specialis* principle might apply in the context of norm overlap. However, relatively little ECJ case law on the operation of *lex specialis* exists and, in what case law there is, the ECJ does not offer a detailed exposition of the principle. The following discussion draws, therefore, also on literature concerning the operation of the *lex specialis* principle in the context of international law.

Where there is a conflict between norms (including between overlapping norms), the principle of *lex specialis* requires that the more specific norm prevails at the expense of the more general norm. The ECJ in *Cipra* adopted a similar understanding of the principle of *lex specialis*. A conflict arose between two different provisions of a regulation relating to road transport.[123] The first provision required drivers transporting goods by road to have at least eleven consecutive hours of daily rest every twenty-four hours. The second provision set out a different minimum rest period for vehicles with two drivers: eight consecutive hours every thirty hours. The dispute in *Cipra* concerned a vehicle with two drivers who had each complied with the rest periods of eight hours every thirty hours, but not with the requirement of eleven consecutive hours of rest in every twenty-four hours. The ECJ held that the drivers did not also need to comply with the requirement of eleven consecutive hours of rest since, given the context,[124] the provision on rest periods for vehicles with two drivers was 'a *lex specialis* that prevails'[125] over the other norm.

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121 Pulkowski (n 56) 324.
122 See e.g. Case 91/78 *Hansen* EU:C:1979:65, para. 10; Case C-444/00 *Mayer Parry Recycling* EU:C:2003:356, paras 51-57; Case C-252/05 *Thames Water Utilities* EU:C:2007:276, para. 39; Case C-582/08 *Commission v UK* EU:C:2010:429, paras 35-36; Case C-128/11 *UsedSoft* EU:C:2012:407, para. 51.
123 Council Regulation 3820/85 of 20 December 1985 on the harmonization of certain social legislation relating to road transport [1985] OJ L 370/1.
124 Case C-439/01 *Cipra and Kvasnicka* EU:C:2003:31, para. 35.
125 *Cipra* (n 124), para. 40. See *Mayer Parry Recycling* (n 122), para. 57; Case C-272/03 *Siig* EU:C:2004:805, para. 16; Case C-110/03 *Belgium v Commission* EU:C:2005:223, para. 39; Case C-441/02 *Commission v Germany* EU:C:2006:253, para. 40; *Thames Water Utilities* (n 122), para. 39.

Importantly, though, the prioritisation of the more specific norm does not invalidate the *lex generalis*.[126] Where there is a conflict between norms and the more general rule sets out guiding principles implemented by the *lex specialis,* the *lex generalis* may still play a role in determining the outcome of a case. In this context, 'the specific rule should be read and understood within the confines or against the background of the general standard, typically as an elaboration, updating or a technical specification of the latter.'[127] In *Mayer Parry Recycling,* the ECJ recognised the continuing role of the *lex generalis* as an aid to the interpretation of the *lex specialis*. A framework directive on waste management set out several overarching principles, which a specific directive later implemented in relation to packaging waste. When discussing the operation of the principle of *lex specialis* in that case, the ECJ held that the more specific rules of the latter directive 'prevail … in situations which [it] specifically seeks to regulate.'[128] However, the *lex generalis* 'remain[ed] very important for the interpretation and application' of the *lex specialis*.[129]

In theory, the principle of *lex specialis* should still offer some guidance to the ECJ where overlapping norms accumulate, although there is no ECJ case law on this point. Pauwelyn argues that, outside of norm conflicts, the principle of *lex specialis* still offers some guidance to judges. The principle operates as a reason for courts to start by examining the more specific rule.[130] In many ways this reflects the logic underlying the *lex specialis* principle as aiming to identify the more efficacious norm. However:

> … to say that the *lex specialis* must be examined first does not amount to saying that the *lex generalis* no longer applies. Both norms apply and it makes logical sense to examine first the *lex specialis*. But nothing precludes that the *lex generalis* is still relevant and adds certain rights or obligations.[131]

Where overlapping norms accumulate, then, the expectation is that the ECJ will begin by analysing the more specific norm. Should that norm not apply, however, there is nothing to prevent the more general norm applying.

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[126] ILC, 'Fragmentation Report Conclusions' (n 116) 9.
[127] ILC, 'Fragmentation Report' (n 57) para. 56.
[128] *Mayer Parry Recycling* (n 122), para. 57.
[129] *Mayer Parry Recycling* (n 122), para. 53.
[130] Pauwelyn (n 84) 411.
[131] Pauwelyn (n 84) 412. Similarly, the ILC notes how '[t]he application of the special law does not normally extinguish the relevant general law', see ILC, 'Fragmentation Report' (n 57) para. 82).

The difficulty with applying the principle of *lex specialis* is the prior question of identifying whether there is a more specific norm. Where norms are equally general, the principle of *lex specialis* cannot apply. Even when one norm is more specific, specificity *per se* is insufficient. The application of the principle of *lex specialis* also depends on the norms also having the 'same subject matter'.[132] A *lex specialis* will either be 'an application of a general standard in a given circumstance'[133] or 'a *modification, overruling* or *setting aside*'[134] of the *lex generalis*. The problem is that the principle of *lex specialis* does not, in and of itself, provide any criteria for identifying when two or more norms have the same subject matter.[135] Without an articulated system for identifying when the principle of *lex specialis* applies, there is a danger that the principle may become a guise for highly political decisions.[136] Linking back to the previous Section and the consequences of how the ECJ approaches questions of norm inter-relationship, the potential manipulation of the principle of *lex specialis* makes the articulation of the criteria for identifying more specialised norms even more important.

How do we determine if one norm is *lex specialis*? The ECJ offers only minimal treatment of this point. In *Otis*, the ECJ held that where rules concern 'distinct questions' the principle of *lex specialis* does not apply.'[137] However, in that case the difference was a palpable one and concerned Treaty provisions relating to very different issues. The applicants argued that a relationship of specialty existed between Articles 317 and 322 TFEU when the former concerns the powers of the EU institutions to establish and implement the EU's budget, whilst Article 335 TFEU confers legal capacity on the EU.[138] The lack of any connection between the Treaty provisions prevented the identification of a *lex specialis*. Offering more practical guidance, legal scholarship proposes several different factors that courts can employ to assess the applicability of the *lex specialis* principle. The first is whether the relevant norms pursue

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132 Fitzmaurice (n 117) 236; Pauwelyn(n 84) 389; Lindroos (n 70) 44; ILC, 'Fragmentation Report' (n 57) para. 116; Pulkowski (n 56) 327;
133 ILC, 'Fragmentation Report' (n 57) para. 88.
134 ILC, 'Fragmentation Report' (n 57) para. 88 (emphasis in original).
135 Lindroos (n 70) 42; N Prud'homme, '*Lex Specialis*: Oversimplifying A More Complex and Multifaceted Relationship?' (2007) 40(02) *Israel Law Review* 356, 380; Simma and Pulkowski (n 117) 489.
136 Lindroos (n 70) 42.
137 Case C-199/11 *Otis and Others* EU:C:2012:684, para. 32. See also Case 2/56 *Geitling v High Authority* EU:C:1957:4, [1957] ECR 3, 20.
138 *Otis and Others* (n 137), para. 32.

the same goal.[139] Pulkowski argues that where 'several treaties have been made in pursuit of different societal goals, it should not be presumed that states intended to privilege one policy goal over another one simply by virtue of opting for a more specific formulation under one of the treaties'.[140] The same could be said for secondary Union law that largely concerns different subject matters but coincides in one area. A second factor looks to the context of the overlapping norms and their place within a wider system.[141] No easy answer exists; the specificity, the aims and the overall context of different norms must be taken into account to determine whether one norm is a *lex specialis* in relation to another.

The role played by the principle of *lex specialis* is picked up again in Chapter 5, which examines the ECJ's approach when faced with overlaps between norms of secondary Union law.

3.3.3 *Lex Posterior*

The principle of *lex posterior* determines priority between norms according to whichever is later in time.[142] The principle has a long-standing history in both the domestic context and in determining relationships between Treaties. In the UK, for example, it is trite law that a later statute repeals an earlier statute to the extent that they are inconsistent.[143] In international law, the Vienna Convention on the Law of Treaties codifies the principle as follows: where there are 'successive treaties relating to the same subject matter'[144] and '[w]hen all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended … the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.'[145] The principle of *lex posterior* aims to ensure respect for the intentions of the legislature. The idea behind

139 Pulkowski (n 56) 328.
140 Pulkowski (n 56) 328.
141 ILC, 'Fragmentation Report' (n 57) para. 119.
142 See generally, Jenks (n 72) 445; Czapliński and Danilenko (n 56) 19; Mus (n 56) 219.
143 This is known as the doctrine of implied repeal, see *Ellen Street Estates v Minister of Health* [1934] 1 KB 590, 595-97.
144 This is the heading of VCLT, Article 30.
145 VCLT, Article 30(3).

applying the more recent norm is that the legislature is aware of the earlier law and intends to overrule it.[146]

The principle of *lex posterior* does not find its way into the EU Treaties nor does the ECJ explicitly refer to it. However, the principle may implicitly form part of the ECJ's reasoning where a later norm appears to supersede an earlier one. When the principle of *lex posterior* does apply, it will prioritise whichever norm is later in time. Where overlapping norms conflict, the principle will not invalidate the prior norm.[147] Where overlapping norms accumulate, the role of *lex posterior* is less clear. However, given the rationale for the principle, it would again make sense to rely on the *lex posterior* as the starting point of analysis.

Where there is no difference in date between norms, the principle of *lex posterior* will not apply. The difficulty is that it is not always easy to identify which date to use and which norm is the later. In relation to secondary Union law, is the date of adoption or the date of entry into force more important? These are questions the ECJ needs to clarify for the principle of *lex posterior* to mediate successfully the relationship between overlapping norms. It would seem the date of adoption is the more important on the grounds that it best fits the rationale for the principle of *lex posterior*. As Lock argues, the date of adoption 'coincides with the most recent manifestation of the parties' intentions, which best reflects the overall object and purpose of the *lex posterior* rule. Its entry into force often happens automatically … There is not necessarily a voluntary element involved.'[148] More complex is identifying the later norm where one secondary Union law is amended, consolidated or recast; does the clock start again with each amendment? This would automatically prioritise secondary Union law in areas requiring frequent updates or may alter previous norm inter-relationships following a consolidation exercise, even if very little had changed. However, this does not fit well with the normative underpinnings of the *lex posterior* principle; consolidating legislation, for example, does not necessarily imply that the Union legislature intended to alter the relationship of priority between norms.

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[146] ILC, 'Fragmentation Report' (n 57) para. 226. In the UK, the principle of implied repeal is also a consequence of Parliamentary sovereignty.
[147] Pauwelyn (n 84) 363.
[148] T Lock, The European Court of Justice and International Courts (OUP 2015) 48.

In relation to higher sources of Union law, the principle of *lex posterior* runs into greater difficulties. In relation to the EU Treaties, does the date of a Treaty norm 're-set' with each round of Treaty amendments? In other words, does a Treaty provision that has been largely unaltered since the original EEC Treaty date back to 1957 or only to the latest iteration of the EU Treaties? If the latter, then principles based on the date of the provision will be of no assistance in determining the inter-relationship between Treaty provisions or between Treaty provisions and the Charter. In relation to the Charter, does it pre-date the Treaty of Lisbon on the grounds of its solemn proclamation in 2000? Prioritising new additions to the Treaties seems counter-intuitive when one considers the aims of the *lex posterior* principle to identify legislative intent; Treaty provisions with a long history – such as the equal pay principle in Article 157 TFEU or the free movement rules – are often understood as fundamental to the EU on account of their historical significance. Even more complex is how one should judge when general principles enter into force as the ECJ purports only to recognise – and not create – general principles of EU law.[149] The date on which the ECJ recognises a general principle will often be arbitrary since it depends on a relevant case reaching the Court. There are thus numerous difficulties with relying on the principle of *lex posterior* in EU law relating and it is difficult to align the guidance offered by the principle with the aim of respecting legislative intent.

Discussion returns to the potential utility of *lex posterior* principle in the context of norm overlap in Chapter 5.

4. CONCLUDING REMARKS

This Chapter started by setting out the importance of how the ECJ resolves the inter-relationship between overlapping norms since it can lead – both in individual cases and across a longer period – to serious constitutional implications. As background concerns, framing any discussion on the ECJ's approach to norm inter-relationship, will thus be the potential impact on fundamental rights protection, the balance of powers between the EU and the Member States, institutional balance and legal certainty. One point

[149] In the context of international law, see Pauwelyn (n 84) 97.

which emerged from this discussion was how the potential repercussions of the ECJ's approach in many ways make the argument for identifying more distinctly the principles that govern norm interactions. In the absence of a clearly articulated and consistently applied system for prioritising overlapping norms, ECJ decisions – with potentially serious consequences – may appear arbitrary.

The ECJ does not often set out the interpretative maxims that guide it in reaching decisions, and the principles that guide norm inter-relationship are no exception. However, on a more general level, there are existing methods for resolving questions of norm inter-relationship: priority clauses and the principles of *lex superior*, *lex posterior* and *lex specialis*. Despite receiving scarce mention in ECJ case, and indeed in EU legal scholarship, this Chapter showed that these principles (although less the *lex posterior* principle) offer workable and normatively justified guidance to the ECJ when faced with overlaps between norms. The remaining Chapters assess ECJ practice, when faced with discrete overlaps, for compatibility with priority clauses and priority principles.

Discussion now turns to the first case study of this thesis; Chapter 3 examines how the ECJ resolves overlaps between primary and secondary Union law, and the role played by the *lex superior* principle.

Chapter Three

Interactions between Overlapping Primary and Secondary Law Norms

1. INTRODUCTION

This Chapter examines how the ECJ approaches the inter-relationship between overlapping norms of primary and secondary Union law. The conclusion reached in Chapter 2 was that the principle of *lex superior*, somewhat modified for the specific context of overlap, offers interpretative guidance to the ECJ when faced with overlaps between primary and secondary Union law. It was argued that the meaning of the *lex superior* principle invariably differs depending on the (ir)reconcilability of overlapping norms: should the lower-ranking norm be in breach of the higher-ranking norm, the principle of *lex superior* implies that the ECJ should strike down the incompatible provisions. Where overlapping norms accumulate, it was contended that the *lex superior* principle takes on a more systemic character requiring interpretation of the lower-ranking norm in line with the higher-ranking norm, but not vice versa.

As a testing ground, this Chapter assesses the role played by the *lex superior* principle in ECJ case law concerning sex discrimination. Chapter 1 outlined the extensive framework of secondary Union law prohibiting sex discrimination that overlaps, first, with Article 157 TFEU – granting the right to 'equal pay … for the same work or for work to which equal value is attributed' and, secondly, with Article 21(1) CFR prohibiting discrimination *inter alia* on grounds of sex. Using the prohibition on discrimination on grounds of sex as a case study here allows for an assessment of the ECJ's approach to the inter-relationship between primary and secondary law since the EU's inception and in relation to both the Treaties and the Charter.[1] The Chapter does not look to the ECJ's reasoning and the principles upon which it expressly purports to

[1] The relationship between Article 18 TFEU and Article 21(2) CFR (as discussed in Chapter 4) essentially pre-empts any consideration of the inter-relationship between Article 21(2) CFR and overlapping secondary Union law.

be relying. The ECJ's terse reasoning style would make such an exercise futile. Instead, this Chapter looks to how – more practically – the ECJ deals with different overlapping norms.

Extensive case law analysis shows that ECJ practice, when faced with an overlap between Article 157 TFEU and secondary Union law, is inconsistent and does not always cohere with the principle of *lex superior*. In most cases, the ECJ relies directly on Article 157 TFEU, without acknowledging the overlapping secondary law, with potentially serious constitutional consequences for legal certainty and institutional balance. The ECJ adopts a different approach to the inter-relationship between Article 21(1) CFR and secondary Union law; still consistent with the *lex superior* principle, the ECJ – where possible – relies directly on secondary law. Comparatively, this approach makes the outcome of cases more predictable and is more in line with the obligation of cooperation between institutions.

The Chapter starts in Section 2 by setting out how the ECJ resolves overlaps between the Treaty and secondary Union law. Section 3 then turns to analyse the ECJ's approach to overlaps between the Charter and secondary Union law.

2. OVERLAPS BETWEEN THE TREATIES AND SECONDARY UNION LAW

2.1. Case Study: Article 157 TFEU and Overlapping Secondary Union Law

Attention now turns to ECJ practice when faced with an overlap between Article 157 TFEU and secondary Union law and assesses the role played by the *lex superior* principle in mediating the inter-relationship between norms. Before considering the ECJ's approach in more detail, let us set out the key legal premises of the case study. As the law stands, Article 157 TFEU on equal pay between men and women overlaps with Directive 2006/54.[2] The present formulation of the equal pay principle in both the Treaty and in secondary law is the result of a Treaty amendment at Amsterdam and the recast of several directives relating to sex discrimination including Directive 75/117[3] on

[2] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/23.
[3] Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member

equal pay between men and women and Directive 86/378[4] on equal treatment between men and women in the field of occupational social security.

Under the current law, there are very few divergences between the principle of equal pay in the Treaties and overlapping secondary Union law. Article 157(1) TFEU (as expressed in the Lisbon Treaty) requires that '[e]ach Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied'. Closely mirroring Article 157(1) TFEU, Article 4 of Directive 2006/54 specifies that '[f]or the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated'. Article 157 TFEU and Directive 2006/54 both apply to *workers*,[5] which the ECJ defines as those 'who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration'.[6] 'Pay' in Article 157(1) TFEU and 'remuneration' as employed by the Directive[7] have the same meaning i.e. 'the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.'[8] This is a broad definition and encompasses occupational social security benefits that are, somewhat confusingly (and reflecting initial misunderstandings over their classification),

States relating to the application of the principle of equal pay for men and women [1975] OJ L45/19.

[4] Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes [1986] OJ L 225/40. Later amended by Council Directive 96/97 amending Directive 86/378 on the implementation of the principle of equal treatment for men and women in occupational social security schemes [1997] OJ L14/13.

[5] Directive 75/117, Article 1; Directive 86/378, Article 3; Directive 96/97, Article 3; Directive 2006/54, Article 4.

[6] Case C-256/01 *Allonby* EU:C:2004:18, paras 66-67, borrowing the definition developed in Case 66/85 *Lawrie-Blum* EU:C:1986:284, para. 17.

[7] While 'pay' and 'remuneration' are used in English language versions, Edward and Lane note that the 'word "pay" is too narrow a translation of terms used in the original language texts (*Entgelt, rémunérations, retribuzioni, beloning*) and has given rise to much misunderstanding … Even "consideration" in article 157(2) is shy of the mark, other texts using words (*avantages; Vergütungen; voordelen*) meaning advantage or recompense', see DAO Edward and RC Lane, *Edward and Lane on European Union Law* (Edward Elgar 2013) 868.

[8] Directive 2006/54, Article 2(1)(e). The ECJ has interpreted 'pay' broadly to encompass *inter alia* sick pay (Case C-66/96 *Høj Pedersen and Others* EU:C:1998:549, para. 32), payments received during maternity leave (whether under legislation or contract) (Case C-342/93 *Gillespie and Others* EU:C:1996:46, para. 14; Case C-411/96 *Boyle and Others* EU:C:1998:506, para. 34), travel concessions (Case 12/81 *Garland* EU:C:1982:44, para. 9), bonuses (Case C-333/97 *Lewen* EU:C:1999:512, para. 21) and redundancy pay (Case C-262/88 *Barber* EU:C:1990:209, para. 14).

treated separately by Directive 2006/54;[9] Article 5 of that Directive prohibits 'direct or indirect discrimination on grounds of sex in occupational social security schemes'.[10]

One longstanding divergence between Article 157 TFEU and Directive 2006/54 concerns their capacity for horizontal direct effect. Directives cannot be invoked in disputes between private parties.[11] In contrast, consistent case law since the 1976 decision in *Defrenne II* maintains that as Article 157 TFEU:

> … is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.[12]

Qualifying the extent of the divergence, the question of horizontal direct effect only becomes pertinent if a Member State fails to implement Directive 2006/54 at all or implements it incorrectly. As the directives on equal pay explicitly regulate private relationships,[13] the ECJ is clear that 'wherever a directive is correctly implemented, its effects extend to individuals through the medium of the implementing measures adopted by the Member State concerned'.[14]

The similarities between Article 157 TFEU and Directive 2006/54 are the result of several amendments to the Treaty framework and to secondary Union law. As noted in Chapter 1, it was not until the Treaty of Amsterdam that Article 157 TFEU required

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[9] See e.g. Case 170/84 *Bilka* EU:C:1986:204, para. 22; Case C-109/91 *Ten Oever* EU:C:1993:833, para. 12. Specifically excluded from the meaning of pay, though, are 'social security schemes or benefits, in particular retirement pensions, directly governed by legislation without any element of agreement within the undertaking or the occupational branch concerned, which are obligatorily applicable to general categories of workers' (Case 80/70 *Defrenne I* EU:C:1971:55, para. 7). This rules out any overlap between Article 157 TFEU and Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1979] OJ L 6/24.

[10] Article 7 specifies that the Directive applies to 'occupational social security schemes which provide protection against the following risks:(i) sickness, (ii) invalidity, (iii) old age, including early retirement, (iv) industrial accidents and occupational diseases, (v) unemployment' as well as schemes 'which provide for other social benefits, in cash or in kind, and in particular survivors' benefits and family allowances, if such benefits constitute a consideration paid by the employer to the worker by reason of the latter's employment.'

[11] Case 152/84 *Marshall* EU:C:1986:84, para. 48; Case C-106/89 *Marleasing* EU:C:1990:395, para. 6; Case C-91/92 *Faccini Dori* EU:C:1994:292, paras 20-25. Directives can, however, have indirect effects in disputes between private parties, e.g. Case C-194/94 *CIA Security International* EU:C:1996:172; Case C-443/98 *Unilever* EU:C:2000:496; Case C-201/02 *Wells* EU:C:2004:12.

[12] Case 43/75 *Defrenne II* EU:C:1976:56; para. 39.

[13] Directive 2006/54, Article 23.

[14] Case 8/81 *Becker* EU:C:1982:7, para. 19.

equal pay 'for equal work or *work of equal value*' (emphasis added). The equal pay provision in the Treaty of Rome (Article 119 EEC) obliged the Member States to 'ensure and subsequently maintain the application of the principle of equal remuneration for *equal work* as between men and women workers' (emphasis added). Directive 75/117 on equal pay first introduced the concept of work of equal value into EU law. That Directive thus initially expanded upon the equal pay principle in the Treaty.[15] As a result, a divergence existed for over two decades between Article 157 TFEU and Directive 75/117.

Another difference between Article 157 TFEU and Directive 75/117 concerned the temporal scope of each provision. Article 157 TFEU tasked the Member States with implementing the equal pay principle by 1 January 1962.[16] The ECJ in *Defrenne II* held that applicants could not rely on that provision retrospectively,[17] i.e. from before the decision in *Defrenne II* (8 April 1976), except where legal proceedings had already commenced.[18] The deadline for transposing Directive 75/117 fell before the decision in *Defrenne II*: 12 February 1976.[19] An applicant could feasibly rely on Directive 75/117 (at least in vertical situations) from 12 February even when they could not rely on Article 157 TFEU until 8 April.

Further divergences (now removed) arose between Article 157 TFEU and Directive 86/378 on equal treatment in the field of occupational social security. First, Directive 86/378 purported to limit the temporal scope of the overlapping primary norm by allowing Member States until 1 January 1993 to implement equal treatment in occupational schemes. The temporal scope of the Directive stood in contrast to the

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[15] Directive 75/117, Article 1 specified that 'where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.' Articles 2 and 3, required that Member States abolish any laws, regulations or administrative provisions leading to pay inequalities and 'ensure that provisions appearing in collective agree-ments, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay shall be, or may be declared, null and void or may be amended that the equal pay principle.'

[16] *Defrenne II* (n 12), para. 56.

[17] This was: (1) on account of the 'possible economic consequences…which undertakings could not have foreseen [that] might seriously affect the financial situation of such undertakings and even drive some of them to bankruptcy' (*Defrenne II* (n 12), paras 69-70) and (2) in light of that fact 'that, over a prolonged period, the parties concerned have been led to continue with practices which were contrary to Article [157 TFEU], although not yet prohibited under their national law', see *Defrenne II* (n 12), para. 72.

[18] *Defrenne II* (n 12), para. 75.

[19] Directive 75/117, Article 8.

ECJ's decision in *Bilka* that pre-dated the Directive. In *Bilka*, the ECJ confirmed that 'pay'[20] encompasses occupational social security schemes and:

> … is infringed by a department store company which excludes part-time employees from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex.[21]

A difference in temporal scope emerged here since Article 157 TFEU could be relied upon from the date of the *Defrenne II* judgment to claim equal treatment in the field of occupational social security.

Secondly, a difference (and potential breach of Article 157 TFEU) emerged due to the permitted derogations from equal treatment set out in Directive 86/378. Article 9 of the Directive allowed Member States to maintain differences concerning:

> (a) determination of pensionable age for the purposes of granting old-age or retirement pensions, and the possible implications for other benefits:
>
> - either until the date on which such equality is achieved in statutory schemes,
>
> - or, at the latest, until such equality is required by a directive.
>
> (b) survivors' pensions until a directive requires the principle of equal treatment in statutory social security schemes in that regard.

Additionally, the Directive allowed for differences in worker contributions to continue 'to take account of the different actuarial calculation factors' for up to thirteen years.[22] These derogations were arguably inconsistent with Article 157 TFEU. It is possible to justify indirectly discriminatory measures – i.e. measures which in fact discriminate against female workers – under Article 157 TFEU.[23] However, to be objectively justifiable such measures had to 'correspond to a real need on the part of the undertaking [be] … appropriate with a view to achieving the objectives pursued and … necessary to that end'.[24] A real danger existed that Directive 86/378 went beyond the permissible limits to Article 157 TFEU. The inter-relationship between Directive

[20] *Bilka* (n 9), para. 22.
[21] *Bilka* (n 9), para. 31.
[22] Article 9(c).
[23] Case 96/80 *Jenkins* EU:C:1981:80, para. 11.
[24] *Bilka* (n 9), para. 36

86/378 and Article 157 TFEU is particularly pertinent here given the potential impact on an applicant's claim to occupational social security benefits.

To recap, before various amendments and changes two major divergences existed between Article 157 TFEU and overlapping secondary law. First, Directive 75/117 appeared to go beyond the requirement of equal pay for equal work set out in the Treaty by also granting a right to equal pay for work of equal value. Secondly, Directive 86/378 permitted Member States to delay the implementation of the principle of equal treatment in certain areas. Following several amendments to the legal framework and the consolidation of Directives 75/117 and 86/378 in Directive 2006/54, the remaining divergence concerns capacity for horizontal direct effect.

2.2. *Lex Superior*

When norms of differing hierarchical status overlap, Chapter 2 established that the principle of *lex superior* offers a workable solution to questions concerning their inter-relationship. The following discussion examines more specifically what reliance on the *lex superior* principle would look like in the context of overlaps between Article 157 TFEU and secondary Union law.

In the context of an overlap between Article 157 TFEU and secondary law it is easy to focus attention on Article 157 TFEU as the higher-ranking norm. However, in so doing, one can forget that the authority for the overlapping secondary norms is the Treaties. The Treaties not only empower the Union legislature to adopt secondary law prohibiting sex discrimination (post-Amsterdam Article 157(3) TFEU *requires* the Union legislature to do so), but the principle of institutional balance in Article 13(2) TEU requires that the Union legislature retains some discretion. Relying directly on secondary Union law should not be thought of as incompatible with the *lex superior* principle, but as fitting with the Treaty framework. Furthermore, as Chapter 2 set out, secondary Union law is often the more logical starting point because: (1) secondary Union law will normally be more specific and so will offer more concrete guidance in a particular case; (2) explicitly starting with secondary Union law better fits the obligation of mutual sincere cooperation between institutions; and (3) this approach fits with the idea that primary law offers a 'check' on the legality of secondary law. A measure of secondary

Union law will have its legal basis in the Treaties and the principle of institutional balance means that the Union legislature must retain some discretion.

The requirements of the *lex superior* principle differ depending on the (ir)reconcilability of the overlapping norms concerned. As will be recalled from Chapter 2, where overlapping norms conflict there is a close relationship between the requirements of the *lex superior* principle and legality review.[25] The conclusion reached in Chapter 2 was that, in the context of norm conflict, the ECJ should not substitute or replace the outcome reached under secondary law unless that secondary law is invalid i.e. where it is 'manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue'.[26] Applied to the case study adopted here, the previous Section raised several concerns about the compatibility of Directive 86/378 on occupational social security with Article 157 TFEU; first, by purporting to narrow the temporal scope of that Treaty provision and, secondly, by permitting several derogations from the principle of equal treatment (as regards pensionable age, survivors' pensions and the use of actuarial factors in determining worker contributions). In this context, existing approaches to norm inter-relationship suggest that the ECJ should assess the compatibility of the time limit and derogations from equal treatment in Directive 86/378 against the equal pay principle in the Treaty and render unlawful any incompatible provision.

This approach prevents the illogical outcome mentioned in Chapter 2 whereby the higher-ranking norms always applies even when the overlapping secondary norm is compatible with that norm (and the Treaties as a whole). As the previous Section highlighted, a conflict initially arose between Directive 75/117 and Article 157 TFEU; Directive 75/117 expanded upon the equal pay principle in Article 157 TFEU by adding a requirement of 'equal pay for work of equal value' and had already entered into force

[25] Article 263 TFEU empowers the ECJ to 'review the legality of legislative acts … on grounds of lack of competence … infringement of the Treaties or of any rule of law relating to their application', while Article 267 TFEU grants the ECJ the power to rule on the 'validity and interpretation of acts of the institutions'.

[26] Joined Cases C-453/03 and C-11-12, 194/04 *ABNA and Others* EU:C:2005:741, para. 69. See also, e.g. Case C-84/94 *UK v Council (Working Time)* EU:C:1996:431, para. 58; Case C-233/94 *Germany v Parliament and Council (Deposit guarantee directive)* EU:C:1997:231, paras 55-56; Case C-210/03 Swedish Match EU:C:2004:802, para. 48; Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* EU:C:2005:449, para. 52; Case C-549/15 *E.ON Biofor Sverige* EU:C:2017:490, para. 50.

by the time of the ECJ's decision in *Defrenne II* (i.e. when the ECJ bestowed Article 157 TFEU with prospective direct effect). Norms conflict when one norm '*constitutes, has led to, or may lead to, a breach of the other*'.[27] Compliance with Article 157 TFEU, when it implies a lesser obligation than the Directive, may lead to a conflict with Directive 75/117. The principle of *lex superior* suggests that the higher-ranking norm should prevail in the context of norm conflicts and so would permit Member States to rely exclusively on Article 157 TFEU. However, as argued in Chapter 2, this does not fit with the system of cross-cutting legislative bases under the Treaties that often empower the Union legislature to expand upon the basic rights contained therein. As the legality of Directive 75/117 is not in question, in theory, the expectation is that the ECJ will not resolve this conflict in favour of Article 157 TFEU.

Where the validity of overlapping secondary Union law is not in question, the *lex superior* principle instead offers differing guidance aiming to secure the coherence of the legal order.[28] Accordingly, secondary Union law should not affect the interpretation of overlapping Union primary law.[29] When applied to the equal pay context this suggests, in particular, that the limitations expressed in the Directives should not be imputed back into Article 157 TFEU. It also suggests that Article 157 TFEU should remain applicable in situations not covered by overlapping secondary law such as in disputes between private parties. Conversely, under the principle of *lex superior*, the ECJ should interpret secondary Union law in line with overlapping primary law. When the meaning of secondary Union law is ambiguous, under the *lex superior* principle the ECJ should opt for an interpretation that best fits with the overlapping Treaty provision.[30] More specifically, in the equal pay context, the ECJ should first assess whether secondary Union law (including derogations from the principle of equal treatment) can be rendered compatible with the Treaties. Furthermore, it implies that any permitted limitations on equal treatment should be interpreted narrowly in line with the overlapping Treaty right.

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[27] J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (CUP 2003) 176 (emphasis in original).
[28] G Conway, *The Limits of Legal Reasoning and the European Court of Justice* (CUP 2012) 155.
[29] P Syrpis, 'The Relationship between Primary and Secondary Law in the EU' (2015) 52(2) *CMLRev* 461, 461.
[30] Case C-314/89 *Rauh* EU:C:1991:143, para. 17; Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* EU:C:2009:716, para. 48.

In sum, where there is an overlap between the Treaty and secondary Union law, the principle of *lex superior* and the system of judicial review under the Treaties offer a workable system for resolving any questions of norm inter-relationship. More specifically, in the context of an overlap between Article 157 TFEU and secondary Union law existing approaches suggest that: (1) Article 157 TFEU provides a yardstick for the validity of the overlapping Directives; (2) where there are no validity concerns, the *lex superior* principle implies that Article 157 TFEU should guide the interpretation of overlapping secondary law; (3) existence of secondary law should not affect the meaning of Article 157 TFEU or otherwise prevent that provision from applying in situations not covered by secondary law. For the reasons outlined above, the ECJ should start its analysis with the relevant secondary law norm (Directive 2006/54 on equal treatment between men and women or its predecessors – Directives 75/117 and 76/378), which – in the absence of any validity concerns – should usually be determinative.

2.3. Consistent with *Lex Superior*

Overlaps between Article 157 TFEU and secondary Union law arose in sixty-nine cases.[31] Of these cases: (1) fifty-two involved an overlap with Directive 75/117; (2) fifteen involved an overlap with Directive 86/378; and (3) one involved an overlap with Directive 2006/54.

2.3.1 Relying on the Relevant Directive

In a minority of cases (six cases, nine per cent) the ECJ commences its analysis with the relevant directive.[32] In each of these six cases the ECJ relied solely on the relevant directive. Four of these cases, each involving an overlap between Article 157 TFEU and

[31] Overlaps were identified by searching the curia.eu database. Searches were carried out for cases involving Article 157 TFEU (and earlier iterations) and for specific directives (i.e. Directive 75/117, 86/378/ 96/97, 2006/54). Only cases on the right to equal pay and the meaning of this right in practice are included in the case law analysed and several cases relating to other aspects of sex equality were discarded. Case law is up to date as of 26 July 2018.

[32] Case 61/81 *Commission v UK* EU:C:1982:258, paras 7-10; Case 143/83 *Commission v Denmark* EU:C:1985:34, para. 14; Case 237/85 *Rummler* EU:C:1986:277, para. 7; Case 109/88 *Handels- og Kontorfunktionaerernes Forbund* EU:C:1989:383, para. 17; Case C-457/98 *Commission v Greece* EU:C:2000:692; Case C-354/16 *Kleinsteuber* EU:C:2017:539, paras 24, 41.

Directive 75/117 on equal pay, concerned aspects of the Directive that *added* to Article 157 TFEU. *Commission v Denmark* concerned the additional requirement (before the amendment of Article 157 TFEU) to grant equal pay for work of equal value in Directive 75/117.[33] *Commission v UK, Rummler* and *Danfoss* dealt with the similar issue of job classification for determining whether work is of equal value.[34]

It is worth recapping here that, where overlapping secondary Union law extends beyond the equal pay principle in Article 157 TFEU, a conflict arises in a strict sense. Article 157 TFEU – as originally framed – only required equal pay for the same work; if a Member State implemented the requirements of Article 157 TFEU alone, this would not satisfy the requirements of Directive 75/117. This is well illustrated by *Commission v Denmark*. Under a Danish law implementing Article 157 TFEU, '[e]very person who employs men and women to work at the same place of work must pay them the same salary for the same work'.[35] The Commission argued that the Danish legislation did not 'fulfil all the obligations resulting from Directive No 75/117 inasmuch as … it requires employers to pay men and women the same salary exclusively for the same work but not for work to which equal value is attributed'.[36] Concurring with the Commission the ECJ held that 'Denmark has failed to fulfil its obligations under the first paragraph of Article 1 of Directive No 75/117 by failing … to extend the principle of equal pay to work of equal value.'[37] Satisfying the higher-ranking norm alone here was not sufficient to comply with the requirements of Union law.

ECJ practice in these six cases, coheres with the argument set out above that the principle of *lex superior* is ill-equipped to deal with this situation. The close association between the notion of *lex superior* and conferrals of power, under which a lower-ranking norm extending beyond the higher-ranking (and empowering norm) would be invalid, does not fit the system of purposive legal bases in the Treaties. In the context of an overlap between Article 157 TFEU and Directive 75/117, the legal basis for the Directive was what is now Article 114 TFEU on the approximation of laws 'which have

[33] *Commission v Denmark* (n 32), para. 14.
[34] *Commission v UK* (n 32), para. 8; *Rummler* (n 32), para. 7; *Handels- og Kontorfunktionaerernes Forbund* (n 32), para. 17.
[35] *Commission v Denmark* (n 32), para. 4.
[36] *Commission v Denmark* (n 32), para. 5.
[37] *Commission v Denmark* (n 32), para. 14. See also *Commission v UK* (n 32), paras 7-10.

as their object the establishment and functioning of the internal market.' If one interprets the *lex superior* principle as dictating that all conflicts should be resolved on the basis of the higher-ranking norm then this would contradict the legislature's capacity to adopt approximating measures that expand upon overlapping Treaty rights.

2.3.2 Applying the Hierarchically Superior Norm

In the vast majority of cases involving an overlap between Article 157 TFEU and secondary Union law (fifty-eight cases, eighty-four per cent), the ECJ followed a different approach. In these cases, the ECJ relied solely on the higher-ranking norm: Article 157 TFEU. In thirty-eight of these cases, the ECJ relied on Article 157 TFEU and barely mentioned the overlapping Directive.[38] In twenty cases, all involving Directive 75/117, the ECJ cites the Directive in the operative part alongside Article 157 TFEU.[39] However, in these cases the Directive is essentially subjugated to the Treaty provision; the ECJ states that 'Directive 75/117 is designed essentially to facilitate the practical application of the principle of equal pay laid down in Article [157 TFEU] of

[38] Case 129/79 *Macarthys* EU:C:1980:103, para. 16; Case 69/80 *Lloyds Bank* EU:C:1981:63, para. 17; *Jenkins* (n 23), paras 15, 18; *Garland* (n 8), para. 11; Case 23/83 *Liefting* EU:C:1984:282, para. 15; *Bilka* (n 9), para. 31; Case 192/85 *Newstead* EU:C:1987:522, para. 21; Case 171/88 *Rinner-Kühn* EU:C:1989:328, para. 16; Case C-33/89 *Kowalska* EU:C:1990:265, para. 16; Case C-184/89 *Nimz* EU:C:1991:50, para. 15; Case C-173/91 *Commission v Belgium* EU:C:1993:64, para. 22; Case C-127/92 *Enderby* EU:C:1993:859, para. 19; Case C-132/92 *Roberts* EU:C:1993:868, para. 24; *Barber* (n 8), para. 20; *Ten Oever* (n 9), para. 12; Case C-110/91 *Moroni* EU:C:1993:926, para. 20; Case C-152/91 *Neath* EU:C:1993:949, para. 34; Case C-7/93 *Beune* EU:C:1994:350, para. 54; Case C-408/92 *Avdel Systems* EU:C:1994:349, para. 22; Case C-200/91 *Coloroll Pension Trustees* EU:C:1994:348, para. 24; Case C-128/93 *Fisscher* EU:C:1994:353, para. 32; Case C-28/93 *van den Akker* EU:C:1994:351, para. 22; Case C-57/93 *Vroege* EU:C:1994:352, para. 18; Case C-435/93 *Dietz* EU:C:1996:395, para. 17; Case C-167/97 *Seymour-Smith and Perez* EU:C:1999:60, para. 65; Case C-218/98 *Abdoulaye and Others* EU:C:1999:424, para. 22; Case C-50/99 *Podesta* EU:C:2000:288, para. 46; Case C-366/99 *Griesmar* EU:C:2001:648, para. 38; Case C-206/00 *Mouflin* EU:C:2001:695, para. 31; Case C-320/00 *Lawrence and Others* EU:C:2002:498, para. 39; Joined Cases C-4/02 and C-5/02 *Schönheit* EU:C:2003:583; *Allonby* (n 6), paras 50, 57, 79, 84; Case C-117/01 *K.B.* EU:C:2004:7, para, 36; Case C-147/02 *Alabaster* EU:C:2004:192, para. 50; Case C-196/02 *Nikoloudi* EU:C:2005:141, para. 40; Case C-17/05 *Cadman* EU:C:2006:633, para. 40; Case C-300/06 *Voß* EU:C:2007:757, para. 44; Case C-173/13 *Leone and Leone* EU:C:2014:2090, para. 98.

[39] Case C-360/90 *Bötel* EU:C:1992:246, para. 27; Case C-297/93 *Grau-Hupka* EU:C:1994:406, para. 29; Joined Cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93 *Helmig* EU:C:1994:415, para. 31; Case C-457/93 *Lewark* EU:C:1996:33, para. 39; *Gillespie and Others* (n 8), para. 20; Case C-278/93 *Freers and Speckmann* EU:C:1996:83, para. 31; Case C-1/95 *Gerster* EU:C:1997:452, para. 25; Case C-249/96 *Grant* EU:C:1998:63, para. 50; Case C-243/95 *Hill and Stapleton* EU:C:1998:298, para. 44; *Boyle and Others* (n 8), para. 44; *Høj Pedersen and Others* (n 8) paras 41, 50; Case C-187/98 *Commission v Greece* EU:C:1999:535, para. 55; Case C-285/02 *Elsner-Lakeberg* EU:C:2004:320, para. 19; Case C-220/02 *Österreichischer Gewerkschaftsbund* EU:C:2004:334, para. 65; Case C-19/02 *Hlozek* EU:C:2004:779, para. 51; Case C-191/03 *McKenna* EU:C:2005:513, para. 69; Case C-427/11 *Kenny and Others* EU:C:2013:122, para. 52; Case C-335/15 *Ornano* EU:C:2016:564, para. 44.

the Treaty and thus that it in no way alters the content or scope of the principle as defined in that article'.[40]

ECJ practice in these cases is consistent with the principle of *lex superior* interpreted as requiring reliance on the hierarchically superior norm. The ECJ's reasoning in these cases relegates the role of overlapping secondary law. In *Defrenne II*,[41] the ECJ distinguished between situations where discrimination 'may be identified solely with the aid of the criteria based on equal work and equal pay referred to by the [Treaty]' and situations where discrimination 'can only be identified by reference to more explicit implementing provisions'.[42] In so doing, the ECJ suggested that secondary Union law is unnecessary where:

> … the court is in a position to establish all the facts which enable it to decide whether a woman worker is receiving lower pay than a male worker performing the same tasks … In such situation, at least, Article [157 TFEU] is directly applicable and may thus give rise to individual rights which the courts must protect.[43]

The implication is that only outside this 'legally perfect core'[44] does secondary Union law become relevant.

The ECJ cites *Defrenne II* in later case law to support its conclusion that there is no need analyse the overlapping directives. In *Macarthys*, for example, the ECJ held that as the dispute 'may be decided within the framework of an interpretation of Article [157 TFEU] alone … it is unnecessary to answer the questions submitted in so far as they relate to the effect and to the interpretation of Directive No 75/117.'[45] In those cases where the ECJ decides that it can rely directly on Article 157 TFEU, the ECJ is clear

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[40] *Helmig* (n 39), para. 19; *Høj Pedersen and Others* (n 8), para. 29.
[41] *Defrenne II* (n 12).
[42] *Defrenne II* (n 12), para. 18. The ECJ initially drew a distinction between 'direct' and 'indirect' discrimination here, which misleadingly suggested that Article 157 TFEU did not apply to indirect discrimination i.e. differentiation ostensibly based on factors not related to sex that disproportionately affects women (see e.g. the concerns raised in Case 69/80 *Lloyds Bank* EU:C:1980:290, [1981] ECR 767, Opinion of AG Warner, 803). The ECJ later reformulated the principle to remove the reference to indirect discrimination and held instead that Article 157 TFEU 'applies directly to all forms of discrimination which may be identified solely with the aid of the criteria of equal work and equal pay referred to by the article in question, without national or Community measures being required to define them with greater precision in order to permit of their application' (*Lloyds Bank* (n 40), para. 23).
[43] *Defrenne II* (n 12), paras 23-24.
[44] JH Jans, 'The Effect in National Legal Systems of the Prohibition of Discrimination on Grounds of Age as a General Principle of Community Law' (2007) 34(1) *Legal Issues of Economic Integration* 53, 59.
[45] *Macarthys* (n 38), para. 17.

that there is 'no need' to consider Directive 75/117[46] and as the Directive 'is principally designed to facilitate the practical application of the principle of equal pay outlined in Article [157 TFEU]' it 'in no way alters the content or scope of that principle as defined in the Treaty'.[47] If the ECJ does interpret the relationship between Article 157 TFEU and overlapping secondary law to mean that secondary law only applies where more specific implementing measures are necessary, it is unclear when the ECJ understands that this would be the case. Although in the six cases outlined above the ECJ relies on Directive 75/117 when it expands upon the overlapping Treaty right, the ECJ adopts the opposite approach in several cases discussed below.

Other explanations for the ECJ's reliance on the hierarchically superior norm (aside from complying with the *lex superior* principle) focus on the effectiveness of EU law. De Witte suggests that the decision in *Defrenne II* 'may well have been inspired by the will to react to the political inertia of the Council which was unable, in those years, to implement the integration programme formulated by the Treaty.'[48] Similarly, Spaventa argues that the ECJ 'might have been motivated by the dual desire of maximising the rights of individual claimants … and of maximising the effectiveness of Union law, so as to further reduce the scope for Member State's mis-or non-implementation of'[49] the equal pay principle. Indeed, the ECJ in *Defrenne II* remarked on the Commission's failure to initiate infringement proceedings as 'likely to consolidate the incorrect impression as to the effects of Article [157 TFEU]'.[50] This explanation does not, however, justify the ECJ's continued reliance directly on Article 157 TFEU in more recent years.

To assess why the ECJ might adopt this approach to norm inter-relationship, discussion now turns to assess the implications of relying directly on the higher-ranking norm instead of the relevant directive. Although both approaches are compatible with the *lex*

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[46] *Garland* (n 8), para. 12
[47] *Jenkins* (n 23), para. 22. See also *Newstead* (n 38), para. 20.
[48] B de Witte, 'Direct Effect, Primacy and the Nature of the Legal Order' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 323-362, 330.
[49] E Spaventa, 'The Horizontal Application of Fundamental Rights as General Principles of Union Law' in A Arnull and others (eds), *A Constitutional Order of States? Essays in EU law in honour of Alan Dashwood* (Hart 2011) 199-218, 216.
[50] *Defrenne II* (n 12), para. 39. See also, S Van den Bogaert, 'Horizontality' in C Barnard and J Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Bloomsbury 2002) 123-152, 138.

superior principle, considerable constitutional weight attaches to whether the ECJ grounds its decision in Article 157 TFEU or in overlapping secondary law.

2.3.3 Overlapping Secondary Law that Complies with Article 157 TFEU

The repercussions differ depending on the situation and whether the validity of the overlapping secondary law is in question. Due to the similarities between Article 157 TFEU and overlapping secondary law, relying directly on Article 157 TFEU will not always alter the outcome of the case. The ECJ recognised this point in several cases concerning the meaning of 'pay' under Article 157 TFEU (the meaning of which is the same under both Article 157 TFEU and Directive 75/117); according to the ECJ, Directive 75/117 is 'purposeless'[51] when interpretation of Article 157 TFEU reaches the same conclusion. Similarly, in *Jenkins* the ECJ dismissed consideration of Directive 75/117 as unnecessary since that Directive only aimed to 'implement' and 'restate' the principle of equal pay in Article 157 TFEU.[52] As the case concerned the meaning of discrimination,[53] which is common to Directive 75/117 and Article 157 TFEU, the ECJ's approach probably did not alter the result.

There are, however, less tangible implications of the ECJ's approach here. By relying directly on the Treaty, the ECJ takes on a law-making role since the interpretation of Article 157 TFEU 'cannot, therefore, subsequently be put into question by adopting new legislative rules.'[54] As Davies notes '[i]t would seem that only Treaty change can undo such constitutionally entrenched interpretations, and targeted Treaty change to address a specific policy concern is of course an extremely high political hurdle.'[55] By relying directly on Article 157 TFEU the ECJ essentially entrenches its interpretation of Article 157 TFEU and diminishes the freedom of the Union legislature to reframe the equal pay principle. In the same way, relying directly on Article 157 TFEU impacts on the balance of powers between the EU and the Member States. By grounding its

[51] *Lloyds Bank* (n 38), para. 20. See also *Garland* (n 8), para. 12; *Newstead* (n 38), para. 20.
[52] *Jenkins* (n 23), paras 19-20
[53] The referring court asked whether paying part-time workers (who were mostly female) less than full-time workers amounted to indirect discrimination.
[54] R Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (Macmillan 1998) 81.
[55] G Davies, 'Legislative Control of the European Court of Justice' (2014) 51(6) *CMLRev* 1579, 1582.

interpretations directly in the Treaty, any attempt to alter or limit the ECJ's interpretation will require a Treaty, not just legislative, amendment.[56]

In other situations, moreover, relying directly on Article 157 TFEU does alter the outcome. In *Neath* and *Coloroll,* the ECJ relied directly on Article 157 TFEU despite that Treaty norm offering lesser protection than the overlapping Directive. Both cases concerned *defined benefit* pension schemes[57] under which employer contributions differed for men and women according to actuarial factors.[58] Additionally, actuarial factors based on sex were relied upon: (1) to alter the pension due following early retirement;[59] (2) to determine the amount of a pension that can be drawn down as a lump sum;[60] (3) to determine the transfer value of the pension;[61] and (4) when converting an old-age pension into a survivors pension.[62] The ECJ was asked, *inter alia*, to determine whether this amounted to discrimination on grounds of sex.

Directive 86/378 allowed the continued use of actuarial factors in occupational pensions but only for *defined contribution* schemes (and not the defined benefit schemes in question in *Neath* and *Coloroll*). According to Article 6(1) of the Directive:

> Provisions contrary to the principle of equal treatment shall include those based on sex, either directly or indirectly … for …
>
> (h) setting different levels of benefit, except insofar as may be necessary to take account of actuarial calculation factors which differ according to sex in the case of benefits designated as *contribution-defined*;
>
> (i) setting different levels of *worker contribution*;
>
> setting different levels of employer contribution in the case of benefits designated as *contribution-defined* [i.e. money-purchase schemes], except with a view to making the amount of those benefits more nearly equal.[63]

Similarly, Article 9 of Directive 86/378 allowed 'Member States [to] defer compulsory application of the principle of equal treatment with regard to [setting different levels of

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[56] For an attempt to reverse the ECJ's interpretation of Article 157 TFEU, see the discussion below in relation to the *Barber* decision.
[57] *Neath* (n 38), para. 19; *Coloroll Pension Trustees* (n 38), para. 4.
[58] *Neath* (n 38), para. 22; *Coloroll Pension Trustees* (n 38), para. 10.
[59] *Coloroll Pension Trustees* (n 38), para. 5.
[60] *Neath* (n 38), para. 7; *Coloroll Pension Trustees* (n 38), para. 6.
[61] *Neath* (n 38), para. 7; *Coloroll Pension Trustees* (n 38), para. 6.
[62] *Coloroll Pension Trustees* (n 38), para. 6.
[63] Emphasis added.

worker contribution] to take account of the different actuarial calculation factors, at the latest until the expiry of a thirteen year period'. By 1 January 1993 (and by the time of the judgments) Directive 86/378 prohibited the use of actuarial factors to determine *employer contributions* to *defined-benefit* pension schemes. The Directive only included exceptions with regard to *employee contributions* and *defined-contribution* schemes.

When deciding whether the different levels of employer contributions for men and women amounted to discrimination based on sex in *Neath* and *Coloroll,* the ECJ relied solely on Article 157 TFEU. It did not engage with the provisions of the Directive prohibiting differing employer contributions nor did it strike down this aspect of the Directive. Instead, the ECJ in *Neath* held that the 'inequality of employers' contributions paid under funded defined-benefit schemes, which is due to the use of actuarial factors differing according to sex, is not struck at by Article [157 TFEU].'[64] According to the ECJ '[t]hat conclusion necessarily extends to the specific aspects referred to in the questions submitted, namely the conversion of part of the periodic pension into a capital sum and the transfer of pension rights'.[65] The ECJ thereby interpreted Article 157 TFEU as offering lesser protection from discrimination in relation to employer contributions than the overlapping Directive[66] and did not consider whether the Directive could still apply.

This approach negatively impacts upon the principle of institutional balance as set out in Article 13(2) TEU. According to that provision, '[e]ach institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them.' The ECJ further specifies that to comply with the principle of institutional balance 'each of the institutions must exercise its powers with due regard for the powers of the other institutions.'[67] The Treaties

[64] *Neath* (n 38), para. 32.
[65] *Neath* (n 38), para. 33.
[66] The ECJ did, however, interpret Article 157 TFEU as prohibiting the use of actuarial factors to determine employee contributions, see *Neath* (n 38), para. 31; *Coloroll Pension Trustees* (n 38), para. 80. This aspect of the decisions essentially invalidated several derogations of Directive 86/378 that were not at issue in either case (a point the ECJ in *Neath*, where it held that 'The amount of those contributions must therefore be the same for all employees, male and female, which is indeed so in the present case' (*Neath* (n 38), para. 31)). The discussion below returns to the ECJ's direct reliance on Article 157 TFEU instead of striking down overlapping secondary law.
[67] Case C-70/88 *Parliament v Council (Chernobyl)* EU:C:1990:217, para. 22.

allocate to the ECJ the responsibility of ensuring that the law is observed in the interpretation and application of the Treaties,[68] not of legislating. In the context of an overlap between Article 157 TFEU and secondary Union law, there is inevitably some coincidence between the ECJ's role in interpreting the Treaties and task of the Union legislature (post-Amsterdam) to further the aim of equal treatment. However, when interpreting Article 157 TFEU and its relationship to overlapping secondary law, the ECJ 'cannot deprive the … [Union legislature] of a prerogative granted to them by the Treaties themselves.'[69]

The ECJ approach to norm overlap in *Neath* and *Coloroll* replaces a choice of the Union legislature on when to permit the continued use of actuarial factors with the Courts' own determination of that question. The Commission's draft proposal for Directive 86/378 prohibited use of actuarial factors to set differing contribution rates and benefits.[70] The Economic and Social Committee specifically picked up this point in its Opinion on the Commission's proposal and argued for an exception allowing the use of actuarial factors to determine employee contributions.[71] Ignoring these prior discussions, the ECJ essentially overruled this aspect of the Directive and pre-determined the content of future directives on occupational social security. This is clear from the wording of Directive 96/97, the Preamble of which explicitly refers to the ECJ's decisions in *Neath* and *Coloroll*. The amendments made to Article 6 of Directive 86/378 by Directive 96/97 mimic the language used by the ECJ in *Neath* and *Coloroll*. For example, Article 6(h) now also includes a prohibition on different levels of benefit except regarding certain elements of defined-benefit schemes, specifically 'conversion into a capital sum of part of a periodic pension , transfer of pension rights, a reversionary pension payable to a dependant in return for the surrender of part of a pension, a reduced pension where the worker opts to take early retirement.'[72] By relying

[68] Article 19 TEU.
[69] Case 149/85 *Wybot* EU:C:1986:310, para. 23.
[70] Commission, 'Proposal for a Council Directive on the implementation of the principle of equal treatment for men and women in occupational social security schemes' COM(83) 217 final, 8.
[71] European Economic and Social Committee, 'Opinion on the proposal for a Council Directive on the implementation of the principle of equal treatment for men and women in occupational social security schemes' [1984] OJ C 35/7, 9.
[72] See also Article 6(i), which allows different levels for employers' contributions 'in the case of defined-contribution schemes if the aim is to equalize the amount of the final benefits or to make them more nearly equal for both sexes' and 'in the case of funded defined-benefit schemes where the employer's contributions are intended to ensure the adequacy of the funds necessary to cover the cost of the benefits

directly on Article 157 TFEU and imbuing that Treaty norm with a different meaning than overlapping secondary law – but without pronouncing on the invalidity of that secondary law – the ECJ encroaches on the prerogatives of the Union legislature to determine how to implement the equal pay principle in the field of occupational social security.

Overturning the legislature's choices is especially problematic here because occupational social security is a complex and technical area. Curtin explains that it had 'been consistently argued over the years that highly complex problems such as the different life expectancies of men and women, different retirement ages, putative pensionable service during maternity leave etc. all militated against direct effect being ascribed to Article [157 TFEU] in the pensions sphere in the absence of implementing legislation.'[73] The Union legislature is able to consult with a wider range of stakeholders when adopting directives and so, from the perspective of institutional competence, the ECJ ought to at least engage with their decisions. As Davies notes what is missed is an appreciation of how:

> … the interpretation of the Treaty is a complex matter, involving abstract reasoning, politically-laden choices, and an awareness of policy consequences. The Court may have the last word on that interpretation, but it should accept that it does not have exclusive expertise over all these matters, so that the views of the legislature are not just to be absorbed within its vision, but are also to contribute to that vision.[74]

Instead, by relying directly on Article 157 TFEU the ECJ avoids the views of the legislature entirely.

A further negative implication of the ECJ's approach here is the impact on legal certainty. When compared with ECJ case law discussed below (when the ECJ reinterprets Article 157 TFEU in light of secondary Union law) the ECJ does not explain why it adopts a different approach here. In *Neath* and *Coloroll*, the ECJ interprets the Treaty as narrower than overlapping secondary Union law. Yet, as will be discussed below, in several cases the ECJ interprets the Treaty broadly in light of secondary law. What leads to these distinct approaches is unclear. Furthermore, the ECJ's failure to

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defined' as was the case in *Neath* and *Coloroll*.

[73] D Curtin, 'Scalping the Community Legislator: Occupational Pensions and "*Barber*"' (1990) 27(3) *CMLRev* 475, 484. See further *Lloyds Bank*. Opinion of AG Warner (n 42) 805-6.

[74] Davies (n 55) 1606.

engage with overlapping secondary law in *Neath* and *Coloroll* leaves the status of the overlapping Directive unclear. As noted above, Article 157 TFEU does not prohibit different employer contributions; but the Directive did and the ECJ does not clarify whether the use of actuarial factors is contrary to Union law. Until the Union legislature adopted Directive 96/97, amending Directive 86/378, it was unclear whether Directive 86/378 still prohibited differences in employer contributions.

Alongside these negative constitutional implications, it is difficult to see the comparative advantage to relying directly on the relevant directive. From the perspective of fundamental rights, the *lex superior* principle does not prevent the ECJ from having recourse to Article 157 TFEU in situations where it might offer greater protection from discrimination such as in disputes between private parties. For example, relying on secondary law as a starting point does not preclude the application of Article 157 TFEU in horizontal cases should a Member State fail to implement an overlapping Directive (correctly).[75] Indeed, as discussed further below, the ECJ adopts this approach where Article 21(1) CFR overlaps with secondary Union law. One might criticise the decision of ECJ to grant Article 157 TFEU horizontal direct effect,[76] but this is a distinct question from the inter-relationship between Article 157 TFEU and overlapping directives.

2.3.4 Overlaps Raising Validity Concerns

The repercussions differ when the validity of secondary Union law is called into question. As will be recalled from Section 2.2, two aspects of Directive 86/378 potentially breached the right to equal pay laid down in Article 157 TFEU.[77] First,

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[75] There are several cases involving the incorrect implementation of the relevant sex discrimination directive by a Member State, see e.g. *Bilka* (n 9); *Helmig* (n 39); *Alabaster* (n 38); *Nikoloudi* (n 38).
[76] Oliver and Roth argue that '*Defrenne II* seems to go too far: instead of applying Article [157 TFEU] horizontally, it would have been more appropriate to rely on the obligation of the Member States to enforce in their national law the tenets set forth in Article 141', see P Oliver and WH Roth, 'The Internal Market and the Four Freedoms' (2004) 41(2) *CMLRev* 407, 428). There is extensive literature on the horizontal direct effect of primary law, see e.g. D Wyatt, 'Horizontal Effect of Fundamental Freedoms and the Right to Equality after *Viking* and *Mangold*, and the Implications for Community Competence' (2008) 4 *CYELP* 1; MT Karayigit, 'The Horizontal Effect of the Free Movement Provisions' (2011) 18(3) *MJ* 303; C Krenn, 'A Missing Piece in the Horizontal Effect Jigsaw: Horizontal Direct Effect and the Free Movement of Goods' (2012) 49(1) *CMLRev* 177.
[77] For a detailed breakdown of the different aspects of Directive 86/378 that potentially breach Article 157 TFEU, see Curtin (n 73).

Article 9 of the Directive permitted Member States to maintain differential treatment in relation to:

> (a) determination of pensionable age for the purposes of granting old-age or retirement pensions, and the possible implications for other benefits: …
>
> (b) survivors' pensions …
>
> (c) [setting different levels of worker contribution] to take account of the different actuarial calculation factors, at the latest until [30 July 1999].

In contrast, Article 157 TFEU only permits indirect discrimination where there is an objective justification. Secondly, the Directive allowed Member States to delay implementing the principle of equal treatment until 1 January 1993. This temporal limitation appeared at odds with the ECJ's decision in *Bilka* that women could claim equal access to occupational social security schemes from the date of the *Defrenne II* decision (i.e. 1976).[78]

Barber exemplifies the ECJ's approach to norm inter-relationship when faced with a potential breach of Article 157 TFEU by overlapping secondary Union law. The case concerned Mr Barber's eligibility for early retirement. The normal pensionable age under his employer's pension scheme was sixty-two for men and fifty-two for women[79] and, in the event of redundancy, members of the scheme could claim early retirement at fifty-five for men or fifty for women.[80] Mr Barber challenged the scheme for violating the principle of equal pay for equal work since a woman his age (fifty-two) could claim an immediate pension of greater value than his severance payment. The case thus called into question: (1) the transposition period for implementing Directive 86/378 and (2) the derogation in Article 9(a) allowing Member States to maintain differences in pensionable age.

The ECJ began by ruling that Article 157 TFEU applies to eligibility criteria for compulsory redundancy.[81] Concerning whether the age differential in question amounted to discrimination, the ECJ held that:

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[78] *Bilka* (n 9), para. 31.
[79] *Barber* (n 8), para. 4.
[80] *Barber* (n 8), para. 5.
[81] *Barber* (n 8), para. 11.

> Article [157 TFEU] prohibits any discrimination with regard to pay as between men and women, whatever the system which gives rise to such inequality. Accordingly, it is contrary to Article [157 TFEU] to impose an age condition which differs according to sex in respect of pensions paid under a contracted-out scheme, even if the difference between the pensionable age for men and that for women is based on the one provided for by the national statutory scheme.82

As a result, Mr Barber could rely directly on Article 157 TFEU against his employer during the transposition period for Directive 86/378 when that Directive appeared to condone differences in pensionable age.

The ECJ did acknowledge the different temporal scope of Directive 86/378, but again did not strike down that aspect of the Directive. The ECJ held that '[i]n the light of [the exception regarding pensionable age in Article 9(a) of Directive 86/378[83]], the Member States and the parties concerned were reasonably entitled to consider that Article [157 TFEU] did not apply to pensions paid under contracted-out schemes and that derogations from the principle of equality been men and women were still permitted in that sphere.'[84] Given these circumstances, 'overriding considerations of legal certainty preclude legal situations which have exhausted all their effects in the past from being called in question where that might upset retroactively the financial balance of many contracted-out pension schemes.'[85] The ECJ thereby restricted the possibility of relying on Article 157 TFEU retrospectively except for 'individuals who have taken action in good time in order to safeguard their rights'.[86]

The ECJ mimicked its approach in *Barber* in several later cases. When faced asked again about the effect of the derogations in Article 9 of the Directive, the ECJ relied directly on Article 157 TFEU. In *Ten Oever*, for example, the referring court asked whether survivors' pensions amounted to 'pay' under Article 157 TFEU.[87] In answering the question referred, the ECJ did not discuss the validity of Article 9(b) of Directive 86/378 permitting Member States to delay implementation of the principle of equal

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82 *Barber* (n 8), para. 32.
83 *Barber* (n 8), para. 42.
84 *Barber* (n 8), para. 43.
85 *Barber* (n 8), para. 44.
86 *Barber* (n 8), para. 44. The Member States codified the discussion on temporal scope in Barber in Protocol No 2 to the Maastricht Treaty. According to the Protocol: 'For the purposes of Article [157] of this Treaty, benefits under occupational social security schemes shall not be considered as remuneration if, and in so far as they are attributable to periods of employment prior to 17 May 1990'.
87 *Ten Oever* (n 9), para. 7.

treatment with regard to survivors' pensions. The ECJ instead simply held that 'the survivor's pension in question falls within the scope of Article [157 TFEU].'[88]

Similarly, when asked about the effects of Article 8 of Directive 86/378 allowing Member States until 1 January 1993 to implement the principle of equal treatment, the ECJ did not engage with the validity of that provision. When responding to questions over the effects of Article 8 in *Moroni*, the ECJ held that

> Since with the aid of the constitutive elements of the pay in question and of the criteria laid down in Article [157 TFEU] discrimination may be directly identified as arising from the setting of different retirement ages for men and women in the matter of company pensions, the effects of the directive do not matter, for its provisions cannot in any way restrict the scope of Article [157 TFEU].[89]

Contrary to what might be expected, the ECJ does not start by examining the compatibility of Directive 86/378 with Article 157 TFEU. Instead, the ECJ relies directly on the hierarchically superior norm.

The upshot of each of these cases is that they essentially overruled the derogations in Directive 86/378 – but without saying so.[90] What is problematic is not that the ECJ invalidated the derogation in Directive 86/378; that Article 157 TFEU conditions the legality of overlapping secondary law follows from the hierarchy of norms. The difficulty is that, the ECJ does not even engage with Directive 86/378, which appears contrary to the requirement that institutions 'practice mutual sincere cooperation' set out in the second sentence of Article 13(2) TEU. Horsley argues that the notion of mutual sincere cooperation 'obliges the Court to engage in a more constructive process of inter-institutional policymaking with the Union legislature'[91] and 'places key limits on the Court's freedom to adjust, supplement or simply ignore the Union legislature's

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[88] *Ten Oever* (n 9), para. 12. See also *Avdel Systems* (n 38), para. 11; *van den Akker* (n 38), para. 12.
[89] *Moroni* (n 38), para. 24. See also *Beune* (n 38), paras 63-65; *Fisscher* (n 38), paras 26-27; *Vroege* (n 38), paras 29-30; *Dietz* (n 38), paras 20-21.
[90] This has been recognised in the literature. Deakin describes the decision as 'apparently overriding derogations contained in [Directive 86/378]', see S Deakin, 'Equality in Pensions Law – The Limits of Barber' (1994) 53(02) *CLJ* 236, 237. Similarly, Curtin states that, '[t]he major significance however lies in the Court's *sotto voce* indication that the exception contained in Article 9 of the Directive concerning the deferral of the implementation of the principle of equal treatment with regard to the determination of pensionable age, was contrary to the directly effective terms of Article 119', see Curtin (n 73) 476.
[91] T Horsley, 'Reflections on the Role of the Court of Justice as the "Motor" of European Integration: Legal Limits to Judicial Lawmaking' (2013) 50(4) *CMLRev* 931, 933.

policy choices regarding the scope of EU law."[92] In the cases considered above, the ECJ does not explain whether the overlapping Directive is contrary to Article 157 TFEU or even examine whether it is invalid.[93] In failing to do so, the ECJ essentially limits the power of the Union legislature to permit derogations from the equal pay principle and leaves the Union legislature with little guidance as to what will breach Article 157 TFEU.

2.4. Inconsistent with *Lex Superior*: Reinterpreting the Hierarchically Superior Norm

In four cases (six per cent), the ECJ reinterpreted Article 157 TFEU in line with the overlapping secondary law. Each of these four cases again concerned the expansion of the equal pay principle by Directive 75/117 to encompass a right to equal pay for work of equal value. Yet, in these cases the ECJ interpreted Article 157 TFEU as encompassing the principle of equal pay for work of equal value. In *JämO,* for instance, the ECJ held that:

> It should be recalled at the outset that Article [157 TFEU] lays down the principle that men and women should receive equal pay for the same work or for work deemed to be of *equal value*. Thus, the same work or work deemed to be of equal value must be remunerated in the same way whether it is performed by a man or a woman.[94]

Denying that the overlapping Directive had influenced the interpretation of Article 157 TFEU, the ECJ held that 'Article 1 of Directive 75/117, which is essentially *designed to facilitate* the practical application of the principle of equal pay outlined in Article [157 TFEU], in no way alters the scope or content of that principle as defined in Article [157 TFEU].'[95] Similarly in *Brunnhofer,* the ECJ refers to how 'the fundamental principle laid down in Article 119 of the Treaty *and elaborated by the Directive* precludes unequal pay as between men and women for the same job or work of equal value'.[96] The effect is to

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[92] Horsley (n 91) 948.
[93] Admittedly, in none of the cases above did the referring court raise the validity of the Directive. However, the ECJ can raise the point of its own accord, see e.g. Case 16/65 *Schwarze* EU:C:1965:117, [1965] ECR 1081, 886; Case 62/76 *Strehl* EU:C:1977:18, para. 10; Case C-37/89 *Weiser* EU:C:1990:254, paras 17-18; Case C-395/00 *Cipriani* EU:C:2002:751, para. 54.
[94] Case C-236/98 *JämO* EU:C:2000:173, para. 36. See also Case 157/86 *Murphy* EU:C:1988:62, para. 9; Case C-400/93 *Royal Copenhagen* EU:C:1995:155, para. 40; Case C-381/99 *Brunnhofer* EU:C:2001:358, para. 30.
[95] *JämO* (n 94), para. 37 (emphasis added).
[96] *Brunnhofer* (n 94), para. 30 (emphasis added).

reinterpret Article 157 TFEU in light of overlapping secondary law contrary to the hierarchy of norms.

The ECJ does not explicitly set out what principle of interpretation it adopts here. Significantly, though, the ECJ recasts Directive 75/117 as simply defining Article 157 TFEU – i.e. spelling out its inherent meaning – rather than adding to it. The ECJ refers to Directive 75/117 as 'facilitating' and 'elaborating' on Article 157 TFEU in these cases. This appears somewhat disingenuous following the ECJ's express recognition in *Defrenne II* that Directive 75/117 'implement[s] Article [157] from the point of view of extending the narrow criterion of "equal work"'[97] and 'extend[s] the narrow criterion of "equal work" in accordance in particular with the provisions of [the ILO Convention].'[98] The ECJ does not explain this shift in approach or when it will reinterpret primary law in light of overlapping secondary law. This point is picked up again below to stress the lack of clarity over what principles determine the ECJ's approach here if not the *lex superior* principle.

2.5. Summary

To conclude, the main finding following an extensive analysis of ECJ case law is that – when faced with an overlap between Article 157 TFEU and secondary Union law – the ECJ adopts differing approaches to the inter-relationship between overlapping norms. The ECJ's case law is mostly compatible with the principle of *lex superior*; however, as the preceding discussion demonstrated, relying solely on the higher-ranking norm can have negative repercussions for the balance of powers between the EU and the Member States, institutional balance, and legal certainty. In many instances, although not all, the underlying motivation seems to be to secure equal pay by grounding decisions in the Treaty norm (thereby avoiding the limitations of the overlapping directives while also reinterpreting the Treaty broadly in light of those directives). It is submitted, however, that the ECJ cannot fix all deficiencies with Union legislation or with Member State implementation.

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[97] *Defrenne II* (n 12), para. 20.

[98] *Defrenne II* (n 12), para. 20. In 1951, the ILO adopted the Equal Remuneration Convention containing the principle of 'equal remuneration between male and female workers for work of equal value' ILO Convention No 100 on Equal Remuneration for Men and Women Workers for Work of Equal Value (adopted 29 June 1951, entered into force 23 May 1953) 165 UNTS 303, Article 2(1).

Overall, it is argued that the ECJ should avoid replacing choices of the Union legislature with its own interpretation of how the equal pay principle should be implemented. A better approach, still compatible with the hierarchy of norms, would be for the ECJ to grounds its decision in the relevant directive. Where there are concerns about the compatibility of the directive with overlapping primary norms, the ECJ should explicitly assess the validity of that norm using its own standard of review. It is perhaps counter-intuitive, but explicitly reviewing the legality of secondary law should lead to greater legal certainty and better respect the principle of institutional balance. Article 157 TFEU remains in two ways: first, overlapping secondary law should be interpreted in light of that provision; and, secondly, nothing precludes its application in situations not covered by overlapping directives.

Discussion now turns to examine how the ECJ approaches the inter-relationship between Article 21(1) CFR and overlapping secondary Union law. As will be discussed, the ECJ adopts a markedly different approach to the inter-relationship between Article 21(1) CFR and overlapping secondary norms to how it approaches the inter-relationship between Article 157 TFEU and overlapping secondary Union law. As will be argued below, the ECJ's approach to overlaps between the Charter and secondary Union law compares favourably.

3. OVERLAPS BETWEEN ARTICLE 21(1) CFR AND SECONDARY UNION LAW

3.1. Case Study: Overlaps between Article 21(1) CFR and Secondary Law

Article 21(1) CFR prohibits, *inter alia*, discrimination on grounds of sex. According to that provision '[a]ny discrimination based on any ground such as sex … shall be prohibited.' This Charter right overlaps with most secondary Union law relating to equal treatment between men and women including (in chronological order):

- Directive 79/7, which aims to secure 'the progressive implementation … of the principle of equal treatment for men and women in matters of social security';[99]

[99] Article 1.

- Directive 2004/113,[100] which aims 'to lay down a framework for combating discrimination based on sex in access to and supply of goods and services';[101]
- Directive 2006/54, which consolidates several earlier directives[102] and aims to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation;[103] and
- Directive 2010/41,[104] which 'lays down a framework for putting into effect in the Member States the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, or contributing to the pursuit of such an activity'.[105]

This sub-Section highlights where protection from sex discrimination under Article 21(1) CFR differs from that under overlapping directives.

A first divergence emerges due to the sectoral nature of each of the directives i.e. they are limited as regards to *whom* and to *what* they apply. Directives 2006/54 and 79/7 prohibit discrimination in the fields of employment and occupation. Both measures apply to the 'working population' defined broadly to include 'self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment', and to 'retired or invalided workers and self-employed persons'.[106] Directive 2006/54 prohibits discrimination between men and women as regards as regards pay,[107] occupational social

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[100] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L 373/37.
[101] Article 1.
[102] Recital 1 of the preamble states that the Directive 'recasts by bringing together in a single text the main provisions of': Directive 75/117; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L 39/40; Directive 86/378 as amended by Directive 96/97; Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex [1998] OJ L 14/6.
[103] Article 1.
[104] Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC [2010] OJ L 180/1. That Directive replaces Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood [1986] OJ L359/56.
[105] Article 1(1).
[106] Directive 79/7, Article 2. Directive 2006/54, Article 6 is almost identical.
[107] Article 4.

security schemes[108] and access to employment, vocational training, promotion and working conditions.[109] Statutory social security schemes are covered by Directive 79/7, which prohibits discrimination as regards the conditions of access to social security schemes, the level of contributions and the calculation of benefits.[110]

Special provisions concerning self-employed work (traditionally, although not limited to, farming) are set out in Directive 2010/41. This Directive prohibits discrimination 'on grounds of sex in the public or private sectors, either directly or indirectly, for instance in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity'.[111] The protections of the Directive extend to 'self-employed workers' and 'the spouses [or life-partners] of self-employed workers… where they habitually, under the conditions laid down by national law, participate in the activities of the self-employed worker and perform the same tasks or ancillary tasks.'[112]

Directive 2004/113 broadens the scope of the prohibition on sex discrimination to situations falling outside of employment and occupation. The Directive prohibits discrimination based on sex[113] by 'all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life'.[114] Specifically excluded, however, are 'the content of media and advertising [and] education'.[115]

Contrasting with the sectoral coverage of each directive, the applicability of the Charter is somewhat broader. In terms of to whom the Charter applies, Kilpatrick describes the personal scope of Article 21(1) CFR as 'exceptionally broad' and as potentially encompassing '[a]ll persons within the EU suffering any form of status

[108] Article 5.
[109] Article 14.
[110] Article 4.
[111] Article 4(1).
[112] Article 2.
[113] Article 4(1),
[114] Article 3(1).
[115] Article 3(3).

discrimination'.[116] In a similar vein, Article 21(1) CFR is not restricted to a particular field. The application of the Charter is instead limited by Article 51(1) CFR under which, to trigger the application of the Charter, a Member State must be 'implementing Union law'. Some uncertainty still surrounds what encompasses the meaning of 'implementing' Union law.[117] However, the ECJ has interpreted Article 51(1) CFR as meaning that 'applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.'[118] Potentially, then, the Charter could apply to persons and situations falling outside the scope of overlapping directives (e.g. to education) so long as another provision of EU law is applicable.

A second divergence emerges concerning the permissibility of limits on equal treatment. Each directive allows for certain limitations on or derogations from the principle of non-discrimination. Across each of the directives, an indirectly discriminatory[119] measure may be 'objectively justified by a legitimate aim, [if] the means of achieving that aim are appropriate and necessary'.[120] Additionally, discrete derogations exist in individual directives:

- Directive 79/7 allows Member States to maintain differential treatment with regard to pensionable age, pension benefits for those who have brought up children, survivors benefits and the consequences of contracting out;[121]
- Directive 2004/113 allows for 'differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'[122] and permits the use of sex in actuarial calculations;[123]

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116 C Kilpatrick, 'Non-Discrimination' in S Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 579-604, para. 21.31

117 See further, M Dougan, 'Judicial Review of Member State Action under the General Principles and the Charter: Defining the "Scope of Union Law"' (2015) 52(5) *CMLRev* 1201.

118 Case C-617/10 *Åkerberg Fransson* EU:C:2013:105, para. 21.

119 Indirect discrimination occurs 'where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary'. Directive 2004/113, Article 2(b); Directive 2006/54, Article 2(b); Directive 2010/41, Article 3(b).

120 Directive 2004/113, Article 2(b); Directive 2006/54, Article 2(b); Directive 2010/41, Article 3(b).

121 Article 7(1).

122 Article 4(5).

123 Article 5(1). Discussed further below.

- Directive 2006/54 permits deferral of the principle of equal treatment as regards self-employed persons including (a) pensionable age, (b) survivors benefits and (c) the use of actuarial factors in setting different levels for workers' contributions[124] and differences in access to employment when they amount to a 'genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate'.[125]

The permissibility of limits on Charter rights is set out in Article 52(1) CFR. The provision enumerates several criteria, which go beyond the requirements of appropriateness and necessity. Article 52(1) CFR requires that:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.[126]

What is unclear is how the 'limits on limits' in the Charter will interact with those in overlapping secondary law. Could the Charter form an additional check on national measures, distinct from the directives?

A third (and final) point of divergence emerges concerning capacity for horizontal direct effect. In contrast to directives, which are incapable of being invoked directly in disputes between private parties, the ECJ recently confirmed in *Egenberger*, that Article 21(1) CFR – prohibiting status discrimination – 'prohibit[s] discrimination on various grounds, even where the discrimination derives from contracts between individuals'.[127]

To summarise, the prohibition on sex discrimination set out in Article 21(1) CFR overlaps with four directives prohibiting sex discrimination in discrete fields. The Charter provision potentially applies in situations not covered by the directives, including horizontal situations, and might impose a more stringent test on any derogations. As such, the inter-relationship between Article 21(1) CFR and overlapping

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[124] Article 11.
[125] Article 14(2).
[126] This differs from the justification framework under Article 157(1) TFEU. For further discussion of the inter-relationship between overlapping Charter and Treaty norms, see Chapter 4.
[127] Case C-414/16 *Egenberger* EU:C:2018:257, para. 77.

secondary law poses an important question since the ECJ's approach might impact on the extent of protection available under Union law.

3.2. Article 52(2) CFR and *Lex Superior*

This Section offers a baseline for comparing ECJ practice and sets out the expected approach for when an overlap arises between Article 21(1) CFR and secondary Union law. It begins by considering – and refuting – the argument that Article 52(2) CFR could act as a priority clause here since a priority clause in the Charter would presumably displace the *lex superior* principle.[128]

According to Article 52(2) CFR, the '[r]ights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.' Lenaerts and de Smijter argue that Article 52(2) CFR applies – indirectly – to secondary Union law where a provision of the Charter overlaps with a legislative basis in the Treaties. In their view, Article 21(1) CFR prohibiting discrimination *inter alia* on grounds of sex overlaps with Articles 19(1) and 157(3) TFEU empowering the Union legislature to adopt acts prohibiting sex discrimination and Article 52(2) CFR applies to secondary Union law grounded in those legal bases. In their words:

> … as soon as the Council exercises its powers under Article [19 TFEU], the [EU] act in question will serve as a basis of construing the scope of the corresponding right recognised by Article 21(1) of the Charter. As a result, the latter right will need to be exercised under the conditions and within the limits defined by that [EU] act'.[129]

In sum, they argue that the 'prohibition of discrimination on one of the grounds listed in Article 21(1) of the Charter is thus unlimited until the national or European legislature conditions or limits it'[130] and that Article 52(2) CFR 'refers not only to the [EU or FEU] Treaty, but also to the measures adopted to give effect to those

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[128] As set out in Chapter 2, there is no definitive answer to whether priority clauses can determine the inter-relationship between overlapping norms of differing hierarchical status. Given the largely non-hierarchical structure of international law, it is not possible to draw on comparative practice here. A primary law norm probably can specify that it is subject to secondary Union law; whether a secondary law norm can specify its priority over primary law is less clear.
[129] K Lenaerts and E de Smijter, 'A "Bill of Rights" for the European Union' (2001) 38 *CMLRev* 273, 285.
[130] Lenaerts and de Smijter (n 129) 285.

Treaties.'[131] Their argument would subjugate Article 21(1) CFR to Directive 2004/113 (based on Article 19 TFEU) and Directives 2006/54 and 2010/41 (based on Article 157(3) TFEU); contrary to the hierarchy of norms, those directives would exhaustively define the Charter right.

The implications of their argument are quite far-reaching. For instance, they question whether Article 52(1) CFR (which determines the permissible limits on Charter rights) constrains the Union legislature when adopting measures on the basis of Articles 19 and 157(3) TFEU. In their words '[a] different conclusion would indeed seem to contradict Art. 52(2) of the Charter stating that it is up to the … Treat[ies] to determine the conditions and limits set to the exercise of the rights recognized by the Charter but based on those Treaties.'[132] The logical consequence is that the Union legislature could limit the prohibition on discrimination in a manner exceeding the permissible 'limits on limits' outlined by Article 52(1) CFR.[133] Lenaerts and De Smijter do concede that the 'autonomy of Art. 52(2) of the Charter does not however imply that the EU institutions can take whatever measures they wish to implement the … Treat[ies].'[134] However, they do not set out what the applicable limits are.

It is submitted that Lenaerts and de Smijter wrongly construe Article 52(2) CFR. First, their interpretation does not fit with the text of Article 52(2) CFR. As Prechal and Peers note, if:

> … the Charter drafters had wanted to ensure a different interpretation, they could have inserted words such as 'or measures implementing them' or 'and by the measures adopted to give them effect' in Article 52(2), or referred more generally to limitations permitted by 'Union law' in Article 52(2), just as they did in Articles 47, 51(1) and 53 [CFR].[135]

Secondly, the Explanations to Article 21(1) CFR – to which 'due regard' must be had – do not refer to Article 52(2) CFR (whereas the Explanations to several other Charter

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131 Lenaerts and de Smijter (n 129) 285 n68.
132 Lenaerts and de Smijter (n 129) 285 n68.
133 This is subject, of course, to the compatibility of secondary Union law with the general principles of Union law and the Treaties. Chapter 6 considers further the continuing role for general principles that overlap with Charter rights.
134 Lenaerts and de Smijter (n 129) 285 n68.
135 S Peers and S Prechal, 'Scope and Interpretation of Rights and Principles' in S Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 1455-1522, para. 52.94.

rights do refer to Article 52(2) CFR).[136] Instead, the Explanations specifically differentiate Article 19 TFEU and Article 21(1) CFR:

> Article 19 confers power on the Union to adopt legislative acts, including harmonisation of the Member States' laws and regulations, to combat certain forms of discrimination, listed exhaustively in that Article … In contrast, the provision in Article 21(1) does not create any power to enact anti-discrimination laws in these areas of Member State or private action, nor does it lay down a sweeping ban of discrimination in such wide-ranging areas. Instead, it only addresses discriminations by the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaties, and by Member States only when they are implementing Union law.[137]

The distinction drawn between the operation of Article 19 TFEU and Article 21(1) CFR implies a separation between the different norms.

Thirdly, their approach renders the Charter nugatory following the adoption of secondary Union law. As Craig reminds us, 'we should not lose sight of the fact that the fundamental rights doctrine as developed by the ECJ was used to challenge the legality of [EU] regulations, directives and the like' and that '[t]his was premised on a normative hierarchy in which fundamental rights were superior to [Union] legislation and hence operated as a ground of judicial review.'[138] If secondary Union law could limit the Charter it would be a backward step going against the aim of the Charter to 'strengthen the protection of fundamental rights,[139] not to mention the relationship between primary and secondary Union law as normally understood.[140]

Finally, interpreting Article 52(2) CFR in this manner leads to considerable confusion. The Union legislature adopted Directive 79/7 on the basis of what is now Article 352 TFEU. No overlap arises between Article 21(1) CFR and Article 352 TFEU since the latter empowers the Union legislature to act '[if] action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary

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136 By itself this point would be insufficient to refute the application of Article 52(2) CFR to overlaps between Article 21(1) CFR and secondary Union law, see further Chapter 4, Section 3.3.
137 Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/17 24.
138 P Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (OUP 2011) 228.
139 Preamble, Recital 4.
140 Cf Article 21 TFEU, which expressly reverses the inter-relationship between primary and secondary Union law.

powers'. Applying the approach advocated by Lenaerts and de Smijter would mean the inter-relationship between Directive 79/7 and Article 21(1) CFR differed from the inter-relationship between Article 21(1) CFR and the other overlapping measures. There is also the additional complication in equal pay cases that Article 21(1) CFR overlaps with Article 157(1) TFEU; what would Article 52(2) CFR require in equal pay cases?[141]

The above discussion leads to the conclusion that Article 52(2) CFR does not offer workable guidance concerning the inter-relationship between Article 21(1) CFR and overlapping secondary Union law. Given the Charter's status as primary law – it has the 'the same legal value as the Treaties'[142] – the principle of *lex superior* can again *prima facie* offer workable guidance to the ECJ when resolving questions of norm inter-relationship.

In the context of the specific overlap considered here (i.e. between Article 21(1) CFR and directives prohibiting sex discrimination), the *lex superior* principle does not preclude the relevant secondary norm forming the starting point of the ECJ's analysis. Relying directly on secondary law as a starting point makes even greater sense in the context of overlaps with the Charter; the Charter is 'second order in nature' meaning that it cannot apply in the absence of a connection to a first order provision of Union law such as a directive.[143] Article 21(1) CFR is therefore relevant, in the first place, as a check on the legality of overlapping secondary norms. Any derogations from equal treatment set out in secondary Union law will must not go beyond the 'limits on limits' set out in Article 52(1) CFR. Where secondary Union laws complies with the overlapping Charter right, Article 21(1) CFR remains relevant , in the second place, as an aid to the interpretation of the relevant directive (and any national implementing measures). Furthermore, under the *lex superior* principle, Article 21(1) CFR may still apply if one of the directives does not cover a particular situation i.e. it is outside the discrete areas regulated by the relevant directives or involves a dispute between private parties.

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[141] Chapter 4 discusses the inter-relationship between overlapping provisions of the Treaty and Charter further. Case law analysis carried out in that Chapter suggests that where Treaty and Charter norms overlap, the ECJ interprets Article 52(2) CFR as denying the overlapping Charter right an independent role.

[142] Article 6(1) TEU.

[143] Dougan (n 117) 1201.

3.3. ECJ Practice Consistent with *Lex Superior*

Since the Charter's entry into force, fifteen cases have arisen involving an overlap between Article 21(1) CFR and secondary Union law prohibiting sex discrimination.[144] Overlaps arose between 21(1) CFR and: (1) Directive 79/7 in five cases; (2) Directive 2004/113 in one case; and (3) Directive 2006/54 in nine cases. As further elaborated on below, all of the cases identified cohere with application of the *lex superior* principle as set out above.

Importantly, the relevant directive forms the starting point in each case. Where a referring court questions the validity of the relevant directive, the ECJ assesses that measure for its compatibility with Article 21(1) CFR. In only one case did the ECJ strike down a provision of overlapping secondary law: *Test Achats*.[145] The case concerned the legality of Article 5(2) of Directive 2004/113, which allowed the continued use of actuarial factors based on sex to decide insurance premiums. The ECJ held that:

> Such a provision, which enables the Member States in question to maintain without temporal limitation an exemption from the rule of unisex premiums and benefits, works against the achievement of the objective of equal treatment between men and women, which is the purpose of Directive 2004/113, and is incompatible with Articles 21 and 23 of the Charter.[146]

The ECJ's decision here confirms that it does not adopt Lenaerts' and de Smijter's interpretation of Article 52(2) CFR.

The ECJ's approach in *Test-Achats* is a welcome departure from the ECJ's implicit overruling of Directive 86/378 on occupational social security in *Barber* discussed above. In line with the obligation to practice 'mutual sincere cooperation', the ECJ addresses the issue of invalidity in the context of an overlap involving norm conflict and then explains *why* the derogation in the Directive is contrary to Article 21(1) CFR. The ECJ's core concern – and the reason for striking down the exception – was the 'risk that EU law may permit the derogation from the equal treatment of men and women, provided for in Article 5(2) of Directive 2004/113, to persist indefinitely.'[147] In explaining how

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[144] Cases were identified by searching the curia.eu database by provision i.e. Directive 79/7; Directive 2004/113 and Directive 2006/54.
[145] Case C-236/09 *Test-Achats* EU:C:2011:100.
[146] *Test-Achats* (n 145), para. 32.
[147] *Test-Achats* (n 145), para. 31.

the legislature's choices breached the overlapping Charter right, the ECJ offers future guidance for the adoption of non-discrimination directives.

In the remaining cases the ECJ does not have recourse to the Charter. However, it is submitted that these cases are still consistent with the *lex superior* principle. Focusing solely on secondary law expressions of the prohibition on sex discrimination would only be problematic if the ECJ implied that secondary law exhaustively defined Article 21(1) CFR. As will be demonstrated, that does not appear to be the case in any of the judgments delivered to date.

In six of the cases analysed, the ECJ concluded that the national measure fell foul of the relevant directive and amounted to discrimination on grounds of sex.[148] There is no need to consider the protections offered by the Charter in such cases following a finding of discrimination. It would be incompatible with the express aims of the Charter to 'strengthen the protection of fundamental rights'[149] and to 'reaffirm' existing rights protection[150] to assess whether a national measure can be 'saved' by the Charter. Furthermore, to adopt a different understanding of 'discrimination' would be to depart from a well-established definition (largely elucidated by the ECJ itself).

In seven cases, the ECJ held that the contested measure complied with the relevant directive. In none of these cases did the ECJ turn to consider whether the Charter applied. However, turning to consider the Charter would not have altered the outcome given the common meaning of 'discrimination' in EU law. In *Cachaldora Fernandez*, *Plaza Bravo* and *Kleinsteuber* the ECJ held that the remuneration of part-time workers respected the *pro rata temporis* rule and so did not discriminate.[151] In *Z* and *D*, the ECJ held that it did not amount to discrimination on grounds of sex (which encompasses discrimination on grounds of pregnancy) to deny commissioning mothers in surrogacy agreements

148 Case C-595/12 *Napoli* EU:C:2014:128, para. 39; Case C-222/14 *Maïstrellis* EU:C:2015:473, para. 53; Case C-531/15 *Otero Ramos* EU:C:2017:789, para. 63; Case C-98/15 *Espadas Recio* EU:C:2017:833, para. 49; Joined Cases C-142/17 and C-143/17 *Maturi and Others* EU:C:2018:68, para. 40; Case C-451/16 *MB* EU:C:2018:492, para. 53.
149 Preamble, Recital 4.
150 Preamble, Recital 5.
151 Case C-527/13 *Cachaldora Fernández* EU:C:2015:215, para. 40; Case C-137/15 *Plaza Bravo* EU:C:2015:771, para. 30; *Kleinsteuber* (n 32), para. 47.

(who do not give birth) maternity leave.[152] The refusal to grant a commissioning mother maternity leave did not amount to discrimination on grounds of sex since a commissioning father would be treated in the same manner[153] and there could be no less favourable treatment on grounds of pregnancy.[154] Where the ECJ concludes, as in each of these cases, that women do not suffer from any disadvantage compared to men it is unlikely to reach a different conclusion under Article 21(1) CFR.

The final case involving an overlap between Article 21(1) CFR and secondary law, *Kratzer*, raised additional complexities. Mr Kratzer applied for a job with the sole purpose of claiming compensation for discrimination.[155] The ECJ held that he fell outside the personal scope of Directive 2006/54 on equal treatment between men and women in employment since he was not actually seeking employment[156] nor could he 'be regarded as a "victim" within the meaning of … Article 25 of Directive 2006/54 or a "person injured" having sustained "loss" or "damage", within the meaning of Article 18 of Directive 2006/54.'[157] The ECJ did not then consider whether Mr Kratzer had suffered discrimination prohibited by the Charter; however, it is unclear what first order provision of Union law would have brought the situation of the applicant within the scope of the Charter here. What is more, the ECJ considered that Mr Kratzer's actions may amount to an abuse of rights, which would prevent Mr Kratzer from relying on either Directive 2006/54 or the Charter since 'EU law cannot be relied on for abusive or fraudulent ends'.[158]

By consistently relying directly on secondary Union law in the first instance, the ECJ ensures respect for the principle of legal certainty, which 'aims to ensure that situations and legal relationships governed by [EU] law remain foreseeable.'[159] At the very least, resolving overlaps in this way offers greater predictability than the ECJ's approach to overlaps between Article 157 TFEU and secondary Union law. When dealing with

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[152] Case C-363/12 *Z* EU:C:2014:159, para. 60; Case C-167/12 *D* EU:C:2014:169, para. 55.
[153] *Z* (n 152), para. 52; *D* (n 152), para. 47.
[154] *Z* (n 152), para. 57; *D* (n 152), para. 52.
[155] Case C-423/15 *Kratzer* EU:C:2016:604, para. 26.
[156] *Kratzer* (n 155), paras 34-35.
[157] *Kratzer* (n 155), para. 36.
[158] *Kratzer* (n 155), para. 36.
[159] Case C-63/93 *Duff and Others* EU:C:1996:51, para. 20.

overlaps between the equal pay principle in the Treaty and in secondary law, the ECJ did not adopt a coherent method. In some cases, the ECJ specifically started its analysis with the relevant directive; however, it also adopted differing and even contradictory approaches. In several cases the ECJ relied directly on Article 157 TFEU even if the Treaty norm offered lesser protection from discrimination; in other cases, the ECJ interpreted Article 157 TFEU broadly in light of overlapping secondary law. The ECJ's failure to articulate and adhere to principles of norm inter-relationship meant that it could not be predicted with any certainty what the outcome would be in a given situation. Uncertainty surrounded, in particular, whether the ECJ would interpret Article 157 TFEU in light of or differently from overlapping secondary law.

In contrast, by invariably adopting secondary law as the starting point of its analysis in cases where Article 21(1) CFR might be relevant, the ECJ's approach better protects the principle of legal certainty: first, because – quite simply – the ECJ adopts a consistent approach to the inter-relationship between overlapping norms; secondly, due to the nature of the directives prohibiting discrimination on grounds of sex that give specific expression to the broad prohibition in Article 21(1) CFR. Each directive offers more concrete guidance on what amounts to discriminatory conduct and on the permissible derogations from equal treatment. Relying on the relevant directive in the first instance offers greater clarity as to the applicable law. This is not to deny that uncertainties still persist regarding, for example, the meaning of sex discrimination and the scope of application of the Charter. However, the analytical framework set out in secondary law provides a clear starting point for the Court's analysis.

Furthermore, the ECJ's approach to overlaps between Article 21(1) CFR and secondary Union law better respects the principle of institutional balance. As outlined above, the principle of institutional balance places constraints on the interpretative choices of the ECJ. However, some coincidence between the law-making power of the Union legislature and the task of interpretation is inevitable where, as here, primary rights overlap with legal bases empowering the Union legislature to further pursue the goal of equal treatment. By relying on secondary Union laws as a starting point, the ECJ shows greater respect for the role of the Union legislature. Furthermore, when decisions are grounded in secondary law and not primary law, the ECJ does not entrench its

interpretation of sex discrimination and thereby unduly dictate the approach of the Union legislature in future cases.

It should be stressed that the ECJ's approach to the inter-relationship between the Charter and secondary law here does not damage fundamental rights protection. Although not addressed by the case law on Article 21(1) CFR and overlapping sex discrimination directives, ECJ case law concerning discrimination on other prohibited grounds shows the potential application of the Charter in situations not covered by overlapping secondary law. For example, in *Léger*, the ECJ assessed the legality of national rules restricting men who have sexual relations with men from donating blood. The contested rule fell outside the material scope of Directive 2000/78 (prohibiting discrimination on grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation).[160] As the principle of *lex superior* enables, the ECJ then went on to consider the potential application of Article 21(1) CFR. As the national rule implemented a directive on technical requirements for blood and blood components,[161] the situation fell within the scope of the Charter. Any measure within the Charter's field of application 'must respect … Article 21(1) [CFR]'[162] and so, after identifying a difference in treatment on the grounds of sexual orientation,[163] the ECJ examined 'whether the permanent contraindication to blood donation provided for in the [national law] for a man who has had sexual relations with another man none the less satisfies the conditions laid down by Article 52(1) of the Charter in order to be justified.'[164]

The decision in *Léger* confirms the understanding of the *lex superior* principle adopted by this thesis. Although secondary Union law provides the starting point of the ECJ's analysis, this does not prevent the ECJ from turning to Article 21(1) CFR if secondary Union law does not cover the situation. As will be recalled, Directives 79/7, 2004/113 and 2006/54 do not prohibit sex discrimination in all areas of life; the Directives prohibit discrimination as regards social security, employment, access to goods and

[160] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.
[161] Case C-528/13 *Léger* EU:C:2015:288, para. 47.
[162] *Léger* (n 161), para. 48.
[163] *Léger* (n 161), para. 49.
[164] *Léger* (n 161), para. 51.

services available to the public (apart from the content of media and advertising and education) and in self-employed activity. *Léger* indicates that outside of these discrete areas, the ECJ can still apply Article 21(1) CFR directly e.g. to sex discrimination in accessing education (so long as the situation falls otherwise within the scope of application of Union law).

Similarly, the ECJ's decision in *Egenberger* highlights that relying directly on secondary Union law does not prevent the ECJ from having recourse to overlapping primary law in horizontal disputes. *Egenberger* concerned an allegation of discrimination on grounds of religion or belief as prohibited by both Directive 2000/78 and Article 21(1) CFR. The dispute arose between private parties and so, after analysing Directive 2000/78, the ECJ held that:

> In the event that it is impossible to interpret the national provision at issue in the main proceedings in conformity with EU law … Directive 2000/78 does not itself establish the principle of equal treatment in the field of employment and occupation … That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law.[165]

The ECJ is clear that relying directly on secondary Union law does not prevent recourse to the overlapping primary norm in a horizontal situation. The same would seemingly be the case in disputes between private parties relating to sex discrimination.

3.4. Summary

This Section demonstrated that, in the context of an overlap between Article 21(1) CFR and secondary Union law, ECJ practice coheres with the principle of *lex superior*. In practice, this means that recourse to Article 21(1) CFR is necessary only: (1) where the validity of overlapping secondary law is in question; (2) to aid the interpretation of overlapping secondary law; and (3) where a given situation falls outside the scope of the relevant Directive. When compared with the ECJ's approach to overlaps between Article 157 TFEU and secondary Union law, the ECJ's approach here better respects the principle of institutional balance and the principle of legal certainty. Furthermore, it does not appear to impact negatively on fundamental rights protection as the secondary

[165] *Egenberger* (n 127), paras 75-76.

norm does not limit or prevent the application of the overlapping primary norm where it offers greater protection.

4. CONCLUDING REMARKS

This Chapter assessed the ECJ's approach to the inter-relationship between overlapping norms of primary and secondary Union law. Using sex-discrimination as a case study, this Chapter examined whether the principle of *lex superior* informs the ECJ's approach to norm overlap in practice.

When faced with an overlap between Article 157 TFEU and overlapping secondary law, extensive case law analysis shows that the ECJ's approach is usually consistent with the *lex superior* principle – if understood as meaning that the higher-ranking norm should prevail. Chapter 2 argued that the *lex superior* principle may not always work well in the context of the EU legal system given the cross-cutting nature of EU legal bases. This is borne out in practice. Section 2 shows how, in the majority of cases, the ECJ relies directly on the higher-ranking norm. What the above discussion demonstrates is that this approach breaches the principle of institutional balance: first, because the ECJ entrenches one interpretation of the equal pay principle; and, secondly, because in several cases the ECJ essentially invalidates secondary Union law without expressly saying so. It is also damaging to legal certainty since it leaves the validity of overlapping secondary law in limbo.

When faced with an overlap between Article 21(1) CFR and overlapping secondary Union law, the ECJ adopts a different approach. Still consistent with the *lex superior* principle, the ECJ grounds its decisions in the relevant secondary norm where possible. This does not prevent the ECJ from reviewing the compatibility of that secondary law with the Treaties or from applying the Charter right in situations not covered by secondary Union law. It is submitted that this approach better secures a balance between rights protection, legal certainty and institutional balance.

Overall, this Chapter argues that the ECJ ought to emulate the approach adopted when faced with an overlap between Article 21(1) CFR and secondary Union law in the context of overlaps between Article 157 TFEU and overlapping secondary norms. The

ECJ should ground its decisions in the relevant secondary norm. This suggestion does not aim to undermine the hierarchy of the Treaty. If secondary law is in breach of the overlapping Treaty norm, it remains open to the ECJ to render the offending provision invalid. Otherwise, the ECJ should apply the relevant secondary norm. The primary norm should remain in the background as a systemic principle to guide the interpretation of overlapping secondary law and, of course, may still apply should a gap emerge in the secondary law framework. Inevitably, the proposed approach will mean more findings of invalidity. However, as Section 2 shows, this is in effect the consequence of the ECJ's approach in many cases. It should also have the added benefit of requiring the ECJ to flesh out the standard of review of Union legislation in greater detail.

Discussion now turns to examine the ECJ's approach to norm inter-relationship where the question of validity does not arise. Chapter 4 discusses the ECJ's approach to overlaps between norms of primary Union law.

Chapter Four

Interactions between Overlapping Primary Law Norms

1. INTRODUCTION

This Chapter examines how the ECJ interprets the inter-relationship between overlapping norms with the status of primary law. What this Chapter tests, more precisely, is the role played by priority clauses in mediating the inter-relationship between overlapping norms of the same hierarchical status. Chapter 2 argued that where a priority clause stipulates the inter-relationship between norms of the same hierarchical status, the expectation is that the ECJ will accord priority between norms on that basis. This Chapter examines ECJ case law in the field of nationality discrimination and assesses how the ECJ interprets priority clauses in practice.

The first half of the Chapter zooms in on the inter-relationship between overlapping Treaty norms, specifically, Article 18 TFEU – prohibiting discrimination on grounds of nationality '[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein' – and the free movement provisions.[1] After setting out the legal framework in greater detail, discussion turns to the expected implications of the 'without prejudice' clause for the inter-relationship between Article 18 TFEU and the free movement rules. The results of extensive case law analysis are then set out. The main finding here is that ECJ practice usually coheres with the understanding of 'without prejudice' clauses as set out in this thesis. Overall, it is argued that this approach works well, although it is dependent on the ECJ clarifying when the free movement rules apply. A secondary finding is, however, that the ECJ departs from this approach in one line of case law the boundaries of which are difficult to determine.

The second half of the Chapter turns to the inter-relationship between Article 21(2) CFR and Treaty provisions prohibiting nationality discrimination. Article 21(2) CFR

[1] Articles 34, 35, 45, 49, 56 and 63 TFEU.

replicates Article 18 TFEU and provides that '[w]ithin the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited'. The relevant priority clause here – alongside the 'without prejudice' clause in Article 21(2) CFR – is Article 52(2) CFR, which specifies that '[r]ights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.' As introduced in Chapter 2, this latter clause uses different language than most standard priority clauses and creates new interpretative challenges for the ECJ. The main finding here is that, in practice, the ECJ interprets Article 52(2) CFR as subjugating Article 21(2) CFR to the overlapping Treaty provisions and prevents Article 21(2) CFR from playing an autonomous role. It is submitted that the ECJ's approach is overly focused on legal certainty and overlooks the implications of including the prohibition on nationality discrimination in the Charter.

2. OVERLAPS BETWEEN TREATY PROVISIONS

2.1. Case Study: Article 18 TFEU and Overlapping Treaty Provisions

This Section focuses on the overlap between the fundamental freedoms and Article 18 TFEU. To recap from Chapter 1, a measure introducing discrimination on grounds of nationality may amount to an obstacle to the free movement of goods (Articles 34 and 35 TFEU), persons (Articles 45 and 49 TFEU), services (Article 56 TFEU) or capital (Article 63 TFEU). Although framed around abolishing restrictions to intra-EU movement, each free movement rule encompasses a prohibition on nationality discrimination[2] (a point confirmed by ECJ case law[3]). For the free movement rules to apply, certain definitional criteria must be met. For example, for 'the rules on the free

[2] Article 36 TFEU allows for restrictions on the free movement of goods, provided that they do not constitute 'arbitrary discrimination'; Article 45(2) TFEU requires the 'abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work'; Article 49 TFEU requires that Union citizens in a host Member State can carry out activities as self-employed persons 'under the conditions laid down for its own nationals'; Article 56 TFEU requires that service providers are able to do so 'under the same conditions as are imposed by that State on its own nationals.

[3] On Articles 34-35 TFEU, see e.g. Case 251/78 *Denkavit Futtermittel* EU:C:1979:252, para. 6; Case 15/79 *Groenveld* EU:C:1979:253, para. 7. On Article 45 TFEU, see e.g. Case C-279/93 *Schumacker* EU:C:1995:31, para. 26; Case C-55/00 *Gottardo* EU:C:2002:16, para. 35. On Article 49 TFEU, see e.g. Case 2/74 *Reyners* EU:C:1974:68, para. 24. On Article 56 TFEU, see e.g. Case 33/74 *Van Binsbergen* EU:C:1974:131; [1974] ECR 1299, para. 25. On Article 63 TFEU, see e.g. Case C-367/98 *Commission v Portugal (Golden Shares)* EU:C:2002:326, para. 24.

movement of persons to apply, the claimant must fall within the personal, material, and territorial scope of the Treaty provision; in addition, the claimant must be able to rely on the Treaty provision against the particular defendant.'[4] Thus national rules restricting access to certain professions to nationals of that Member State will engage Article 45 TFEU. The applicability of one of the free movement rules will also engage the residual prohibition on discrimination in Article 18 TFEU. According to that provision:

> Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

Article 18 TFEU is thus not freestanding; a situation must already fall 'within the scope of application of the Treaties' for Article 18 TFEU to apply i.e. there must be some connection to EU law.[5] To summarise, where a discriminatory measure restricts intra-EU movement, an overlap will arise between the relevant free movement rule and – in turn – the residual provision in Article 18 TFEU. What follows discusses the extent of this overlap and how the Treaty provisions accumulate and conflict.

The free movement rules and Article 18 TFEU prohibit discriminatory restrictions on intra-EU movement. Common to all provisions is the meaning of nationality discrimination; each norm requires that 'those who find themselves in the same situation … receive the same treatment in law irrespective of their nationality'.[6] Each Treaty provision precludes 'not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead in fact to the same result'.[7] Falling within the notion of covert or indirect discrimination are national measures introducing residency requirements[8] or requiring that qualifications are obtained in the Member State.[9] As a result, where the ECJ finds

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[4] C Barnard, *The Substantive Law of the EU: The Four Freedoms* (5th edn, OUP 2016) 207.
[5] According to ECJ case law, a situation will fall within the scope of application of the Treaties where it relates to the EU's competences and where a Union citizen has exercised the right to move and reside, see e.g. Case 152/82 *Forcheri* EU:C:1983:205, para. 17; Case 293/83 *Gravier* EU:C:1985:69, paras 21-25; Case C-73/08 *Bressol* EU:C:2010:181, para. 31. See further, S Prechal, S de Vries and H van Eijken, 'The Principle of Attributed Powers and the "Scope of EU Law"' in L Besselink, F Pennings and S Prechal (eds), *The Eclipse of the Legality Principle in the European Union* (Kluwer Law International 2011) 213-247, 219.
[6] Case C-209/03 *Bidar* EU:C:2005:169, para. 31.
[7] On Article 45 TFEU, see e.g. Case 152/73 *Sotgiu* EU:C:1974:13, para. 11; Case C-57/96 *Meints* EU:C:1997:564, para. 44. On Article 49 TFEU, see e.g. Case C-337/97 *Meeusen* EU:C:1999:284, para. 29. On Article 56 TFEU, see e.g. Case C-224/97 *Ciola* EU:C:1999:212, paras 13-20.
[8] See e.g. *Sotgiu* (n 7), para. 11; *Meints* (n 7), para. 46; *Bidar* (n 6), para. 53.
[9] See e.g. Case 71/76 *Thieffry* EU:C:1977:65, para. 13; Case C-340/89 *Vlassopoulou* EU:C:1991:193, para.

that a measure amounts to (direct or indirect) nationality discrimination and is contrary to one of the free movement rules, that measure 'will necessarily be contrary to Article [18 TFEU].'[10]

Where differences do emerge is in relation to the framework for justifying discriminatory measures. Included alongside the fundamental freedoms are several express exclusions and derogations from free movement. Measures discriminating directly and indirectly on grounds of nationality are capable of justification where they concern 'employment in the public service'[11] and 'activities … connected, even occasionally, with the exercise of official authority'[12] and where they pursue public policy, public security or public health goals.[13] Where recourse to one of the express derogations in the Treaties is not possible, an indirectly discriminatory restriction on free movement may still be justified if it furthers an additional public interest objective.[14]

Article 18 TFEU, in contrast, does not include a series of express derogations and it is doubtful that Member States can justify directly discriminatory measures under Article 18 TFEU.[15] Ackermann argues that direct discrimination on grounds of nationality under Article 18 TFEU should be capable of justification since '[i]f (direct and indirect)

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[10] Case C-20/92 *Hubbard* EU:C:1993:96, Opinion of AG Darmon, para. 14. See also Case 305/87 *Commission v Greece* EU:C:1989:218, para. 12; Case C-246/89 *Commission v UK* EU:C:1991:375, para. 18; Case C-334/94 *Commission v France* EU:C:1996:90, para. 13; Case C-311/97 *Royal Bank of Scotland* EU:C:1999:216, para. 20; Case C-222/07 *UTECA* EU:C:2009:124, para. 38

[11] Article 45(4) TFEU.

[12] Articles 51 and 62 TFEU.

[13] Articles 36, 45(3), 52(1), 62 and 65(1)(b) TFEU. Article 65(1)(b) TFEU does not permit derogations on public health grounds. Article 36 TFEU additionally permits 'restrictions on imports, exports or goods in transit justified on grounds of public morality … the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property.'

[14] On Articles 34 and 35 TFEU, see e.g. Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior* EU:C:1991:327, para. 13. The ECJ employs slightly different language in the field of goods and refers to overriding public interest objectives as 'mandatory requirements' (e.g. Case 120/78 *Cassis de Dijon* EU:C:1979:42, para. 8), 'imperative requirements' (e.g. *Aragonesa de Publicidad Exterior*, para. 13) and to 'overriding requirements of general public importance' (e.g. Joined Cases C-34-36/95 *De Agostini* EU:C:1997:344, paras 45-46) and describing national measures as 'distinctly' or 'indistinctly applicable' (e.g. *Aragonesa de Publicidad Exterior*, para. 13). In addition, the ECJ sometimes implies that public interest justifications can be relied upon to justify directly discriminatory measures, for discussion see Case C-379/98 *PreussenElektra* EU:C:2000:585, Opinion of AG Jacobs, paras 220-234. On Article 45 TFEU, see e.g. *Schumacker* (n 3), para. 40; Case C-238/15 *Bragança Linares Verruga* EU:C:2016:949, para. 44ff. On Articles 49 and 56 TFEU, see e.g. Case C-347/06 *ASM Brescia* EU:C:2008:416, para. 60. On Article 63 TFEU, see e.g. Case C-52/16 *SEGRO* EU:C:2018:157, para. 76ff.

[15] For discussion, see e.g. Case C-73/08 *Bressol* EU:C:2009:396, Opinion of AG Sharpston, paras 128-131; DAO Edward and RC Lane, *Edward and Lane on European Union Law* (Edward Elgar 2013) para. 8.03.

discrimination on grounds of nationality is, under certain conditions, permitted in the core area of the internal market that is guaranteed by the fundamental freedoms, there is no reason to be stricter if discrimination occurs in a context that is less vital for [EU] law.'[16] However, no ECJ case law exists in favour of such a proposition[17] and in several cases, after establishing direct discrimination, the ECJ did not go on to examine any potential justifications.[18] Further, the ECJ repeatedly refers to how derogations from the Treaties 'must be construed in such a way as to limit its scope to what is strictly necessary for safeguarding the interests'.[19] Indirectly discriminatory measures remain capable of justification under Article 18 TFEU where – as in general – the contested measure is 'appropriate for securing the attainment of the legitimate objective it pursues and must not go beyond what is necessary to attain it'.[20]

For the free movement rules to apply, an applicant must be able to rely on that Treaty provision against a particular defendant. Article 18 TFEU and the Treaty provisions on persons are capable of horizontal effects while the position is less clear in relation to the provisions on goods and capital. The Treaty provisions relating to free movement of persons apply to 'rules which are not public in nature but which are designed to regulate, collectively, self-employment and the provision of services'.[21] Article 18 TFEU applies in a similar manner where 'a group or organisation … exercises a certain power over individuals and is in a position to impose on them conditions which adversely affect the exercise of the fundamental freedoms guaranteed under the Treaty'.[22] Going beyond the position under Articles 18, 49 and 56 TFEU, the ECJ in *Angonese* held that

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[16] See T Ackermann, 'Case Comment on *Data Delecta, Hayes* and *Saldanha*' (1998) 35(3) *CMLRev* 783, 796.
[17] There are hints that the ECJ might entertain justifications of direct discrimination, see e.g. Case C-323/95 *Hayes* EU:C:1997:169, paras 23-34; Case C-85/96 *Martínez Sala* EU:C:1998:217, para. 64; Case C-274/96 *Bickel and Franz* EU:C:1998:563, para. 27; Case C-164/07 *Wood* EU:C:2008:321, para. 15; Case C-524/06 *Huber* EU:C:2008:724, para. 75. See Ackermann (n 16) 795 n 33 and the references cited therein.
[18] *Gravier* (n 5), paras 25-26; Case 186/87 *Cowan* EU:C:1989:47, para. 10; Joined Cases C-92/92 and C-326/92 *Phil Collins* EU:C:1993:847, paras 32-33.
[19] See e.g. Case 66/85 *Lawrie-Blum* EU:C:1986:284, para. 26; Case C-405/01 *Colegio de Oficiales de la Marina Mercante Española* EU:C:2003:515, para. 41.
[20] *Bressol* (n 5), para. 48. See further, e.g. Case C-398/92 *Mund & Fester* EU:C:1994:52, paras 13-21; Case C-103/08 *Gottwald* EU:C:2009:597, paras 28-30.
[21] Case C-309/99 *Wouters* EU:C:2002:98, para. 120. See also, Case 36/74 *Walrave* EU:C:1974:140, para. 17; Case 13/76 *Dona* EU:C:1976:115, para. 18; Case C-415/93 *Bosman* EU:C:1995:463, paras 83-84; Case C-438/05 *Viking Line* EU:C:2007:772, para. 33; Case C-325/08 *Olympique Lyonnais* EU:C:2010:143, para. 30.
[22] Case C-411/98 *Ferlini* EU:C:2000:530, para. 50. See also, e.g. *Bosman* (n 21), paras 83-87.

'the prohibition of discrimination on grounds of nationality laid down in Article [45 TFEU] must be regarded as applying to private persons as well.'[23]

The case law on goods followed a different trajectory.[24] Confining the free movement of goods to vertical effects, the ECJ interpreted Article 34 TFEU in *Dassonville* as applying to 'all trading rules enacted by Member States'.[25] Aside from limited suggestions otherwise,[26] for a long time it seemed that the rules on goods did not apply horizontally even to collective action.[27] The decision in *Fra.bo* called existing case law into question; the ECJ applied Article 34 TFEU to the 'standardisation and certification activities of a private-law body, where the national legislation considers the products certified by that body to be compliant with national law and that has the effect of restricting the marketing of products which are not certified by that body.'[28] What remains unclear following the decision in *Fra.bo* is whether Article 34 TFEU binds the same private parties as Article 18 TFEU.[29] If not, then a divergence between overlapping non-discrimination norms potentially emerges here; Article 18 TFEU could apply in a case involving obstacles to the free movement of goods where the discriminatory measure originates from a private actor acting in a collective manner or in a regulatory capacity.

In relation to capital, 'the issue of horizontal direct effect … has not been definitively addressed by the Court to date.'[30] No consensus exists as to whether the ECJ is likely to recognise Article 63 TFEU as capable of horizontal direct effect. While Schepel argues

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[23] Case C-281/98 *Angonese* EU:C:2000:296, para. 36. Confirmed in Case C-94/07 *Raccanelli* EU:C:2008:425, paras 45-46.

[24] There is considerable academic literature on the extent to which the free movement of goods is and should be horizontally effective, see MT Karayigit, 'The Horizontal Effect of the Free Movement Provisions' (2011) 18(3) *MJ* 303; C Krenn, 'A Missing Piece in the Horizontal Effect Jigsaw: Horizontal Direct Effect and the Free Movement of Goods' (2012) 49(1) *CMLRev* 177; LW Gormley, 'Private Parties and the Free Movement of Goods: Responsible, Irresponsible, or a Lack of Principles?' (2015) 38(4) *Fordham International Law Journal* 993.

[25] Case 8/74 *Dassonville* EU:C:1974:82, para. 5.

[26] E.g. Case 58/80 *Imerco* EU:C:1981:17, para. 17; Case 249/81 *Commission v Ireland (Buy Irish)* EU:C:1982:402, paras 26-27.

[27] E.g. Case C-159/00 *Sapod Audic* EU:C:2002:343, para. 74.

[28] Case C-171/11 *Fra.bo* EU:C:2012:453, para. 32.

[29] This conclusion follows from the fact that the ECJ did 'not refer to any of its previous case law on the (limited) horizontal direct effect of the free movement rules, and especially the "collectively governs" case law [on Articles 45, 49 and 56 TFEU] in which *Fra.bo* seems to fit', see H van Harten and T Nauta, 'Towards Horizontal Direct Effect for the Free Movement of Goods? Comment on *Fra.bo*' (2013) 38(5) *ELRev* 677, 693.

[30] L Flynn, 'Free Movement of Capital' in C Barnard and S Peers (eds), *European Union Law* (2nd edn, OUP 2017) 447-476, 456.

that horizontal direct effect is the 'logical consequence' of existing case law,[31] Barnard is far more circumspect noting that since 'the Court has not yet expressly ruled that Article 49 TFEU on freedom of establishment and Article 56 TFEU on free movement of services have full horizontal direct effect, it seems unlikely that Article 63 TFEU, a later developing freedom, will do so either.'[32] The point remains unconfirmed by the ECJ, however, it seems unlikely that Article 63 TFEU binds private actors to the same extent as Article 18 TFEU. Again, a divergence potentially emerges here.

In sum, where an applicant alleges discrimination on grounds of nationality, this may amount to an obstacle to intra-EU movement contrary to one of the fundamental freedoms and – in turn – engage Article 18 TFEU. Although the Treaty provisions overlap here, differences emerge regarding permissible limits and the capacity of each norm for horizontal direct effect. It is these divergences that make the ECJ's approach to their-relationship between so important. Before turning to discuss ECJ practice, let us first examine the 'without prejudice' clause in Article 18 TFEU.

2.2. The 'Without Prejudice' Clause

Governing the inter-relationship between Article 18 TFEU and the overlapping free movement rules is an express priority clause. Article 18 TFEU codifies the *lex specialis* principle, specifying that the general prohibition on discrimination it enshrines is 'without prejudice to any special provisions contained [in the Treaties]'. It will be recalled from Chapter 2, that 'without prejudice' clauses are a technique adopted by drafters to accord priority to a norm other than the containing norm (i.e. Article 18 TFEU). This Section sets out the guidance offered by the 'without prejudice' clause in Article 18 TFEU when an overlap arises with the free movement rules.

Chapter 2 argued that, where a conflict arises, 'without prejudice' clauses grant priority to the other norm.[33] In the context of this case study, where a measure is either

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[31] H Schepel, 'Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law' (2012) 18(2) *ELJ* 177, 192.
[32] Barnard (n 4) 526.
[33] See e.g. W Czapliński and G Danilenko, 'Conflicts of Norms in International Law' (1990) 21 *Netherlands Yearbook of International Law* 3, 14; JB Mus, 'Conflicts between Treaties in International Law' (1998) 45(2) *Netherlands International Law Review* 208, 214; A Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*' (2005) 74(1) *NJIL* 27, 40.

prohibited or permitted under one of the free movement rules this pre-empts the application of Article 18 TFEU. For example, when a directly discriminatory measure is justified on the grounds of public policy, public security or public health,[34] this should preclude the application of Article 18 TFEU. The same is true for any measure falling within one of the express derogations in the Treaties or otherwise justified on the grounds of an overriding public interest. Where a national measure is contrary to one of the free movement provisions (and amounts to an obstacle to intra-EU movement), this should also preclude any consideration of Article 18 TFEU.

As set out in Chapter 2, an ambiguity arises over what exactly it means for one norm to 'prejudice' another. To illustrate this point, consider the wording of Article 45(2) TFEU; according to that provision, 'freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.' If a worker in a host Member State were to allege discrimination in a field other than 'employment, remuneration and other conditions of work and employment' (as expressly set out in Article 45(2) TFEU), would it prejudice Article 45(2) TFEU for that worker to rely on Article 18 TFEU? The difficulty stems from the fact that the Treaty-framers chose to list the situations in which discriminating against migrant EU workers on grounds of nationality is prohibited without specifying if this is exhaustive or non-exhaustive. *If* the Treaty-framers intended exhaustively to define those situations in which a Member State national working a host Member State could claim equal treatment, would it *prejudice* Article 45(2) TFEU to allow the applicant to rely on Article 18 TFEU? However, it is difficult to impute such an intention to the Treaty framers in the absence of an express permission or prohibition. Thus, as argued in Chapter 2, in general – and befitting the gap-filling role envisaged for Article 18 TFEU[35] – the ECJ should still have recourse to Article 18 TFEU in such situations.

Let us now compare ECJ practice against this baseline.

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[34] See Articles 45(3), 52(1) and 62 TFEU.

[35] See B Sundberg-Weitman, *Discrimination on Grounds of Nationality: Free Movement of Workers and Freedom of Establishment under the EEC Treaty* (North-Holland Publishing Co 1977) 118; G More, 'The Principle of Equal Treatment: From Market Unifier to Fundamental Right?' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (1st edn, OUP 1999) 517-53, 520-21.

2.3. ECJ Practice Consistent with the 'Without Prejudice' Clause

This Section presents the results of an extensive a survey of ECJ case law to show the ECJ's approach in practice. The methodology adopted here differs from that employed in other Chapters for reasons for scope; the sheer volume of case law involving the free movement provisions and/or Article 18 TFEU makes it impractical to consider the ECJ's approach in each case where a *prima facie* overlap arises. What is more, the language used by the ECJ makes it difficult to identify when a case concerns nationality discrimination. For example, the ECJ does not ask whether national rules restricting imports on goods are discriminatory, but whether they are 'capable of hindering directly or indirectly, actually or potentially, intra-[EU] trade'.[36] Similarly, in relation to the free movement of persons, the ECJ frames the question around possible 'deterrent', 'discouraging' or 'dissuasive' effects of a rule or whether it is 'liable to hinder or render less attractive the exercise of' or 'impede' the fundamental freedoms.[37] For example, in *Kraus*, a German rule on the recognition of academic qualifications obtained outside of Germany amounted to discrimination on the grounds of nationality since non-nationals were more likely to obtain their qualifications outside of Germany.[38] However, the ECJ did not refer to this point, but instead framed the German rule as being 'liable to hamper or to render less attractive the exercise … of fundamental freedoms guaranteed by the Treaty'.[39] What follows offers a representative sample of the cases surveyed and focuses on those cases in which the ECJ specifically applies or disregards Article 18 TFEU.

The main finding is that ECJ practice is almost always consistent with respect for the 'without prejudice' clause as set out above; if the contested measure amounts to a restriction on intra-EU movement or is otherwise justified, the ECJ will apply the

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[36] *Dassonville* (n 25), para. 5.
[37] On Article 34 TFEU, see e.g. *Dassonville* (n 25), para. 5; Case C-110/05 *Commission v Italy (Motorcycle Trailers)* EU:C:2009:66, para. 33. On Article 35 TFEU, see e.g. Case C-161/09 *Kakavetsos-Fragkopoulos* EU:C:2011:110, para. 29. On Article 45 TFEU, see e.g. Case C-190/98 *Graf* EU:C:2000:49, para. 23; Case C-18/95 *Terhoeve* EU:C:1999:22, para. 39. On Article 49 TFEU, see e.g. Case C-318/05 *Commission v Germany (School Fees)* EU:C:2007:495, para. 81; Case C-281/06 *Jundt* EU:C:2007:816, para. 52. On Article 56 TFEU, see e.g. Case C-76/90 *Säger* EU:C:1991:331, para. 12; Case C-234/03 *Contse and Others* EU:C:2005:644, para. 33; Case C-158/96 *Kohll* EU:C:1998:171, para. 33. On Article 63(1) TFEU, see e.g. *Commission v Portugal (Golden Shares)*; Case C-370/05 *Festersen* EU:C:2007:59, para. 24.
[38] *Sotgiu* (n 7), para. 11
[39] Case C-19/92 *Kraus* EU:C:1993:125, para. 32.

relevant free movement rule and will not consider Article 18 TFEU.[40] The ECJ expressly refers to the 'without prejudice' clause as mediating the relationship between overlapping norms. In *Hubbard*, for instance, the ECJ held that:

> It should be noted *in limine* that, according to Article [18 TFEU], the prohibition of discrimination is effective "within the scope of application of [the] Treaty" and "without prejudice to any special provisions contained therein". The latter phrase … refers in particular to other Treaty provisions implementing the general principle which it lays down in specific situations.[41]

Similarly, the ECJ repeatedly highlights the more specialised nature of the free movement rules as the 'without prejudice' clause requires; it refers to the free movement rules as 'special provisions' prohibiting discrimination and to how they 'guarantee',[42] 'implement',[43] give 'specific effect' to,[44] are a 'specific application' of,[45] and are a 'specific expression'[46] of Article 18 TFEU. The applicability of one of the more detailed free

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[40] See e.g. *Reyners* (n 3), para. 15ff; Case 118/75 *Watson* EU:C:1976:106, para. 22; Case 90/76 *Van Ameyde* EU:C:1977:101, para. 27ff; Case 136/78 *Auer* EU:C:1979:34, para. 19ff; Case 65/81 *Reina* EU:C:1982:6, para. 18; Case 137/84 *Heinrich* EU:C:1985:335, para. 12ff; Case 222/86 *Heylens* EU:C:1987:442, para. 7ff; *Commission v Greece* (n 10), para. 28; Case C-175/88 *Biehl* EU:C:1990:186, para. 11ff; Case C-10/90 *Masgio* EU:C:1991:107, para. 12ff; Case C-213/90 *ASTI* EU:C:1991:291, para. 10ff; Case C-179/90 *Merci Convenzionali Porto di Genova* EU:C:1991:464, paras 11-13; Case C-112/91 *Werner* EU:C:1993:27, paras 17-20; Case C-20/92 *Hubbard* EU:C:1993:280, paras 10-15; Case C-419/92 *Scholz* EU:C:1994:62, para. 6ff; Case C-18/93 *Corsica Ferries* EU:C:1994:195, para. 19ff; Case C-177/94 *Perfili* EU:C:1996:24, para. 14ff; Case C-131/96 *Mora Romero* EU:C:1997:317, para. 10ff; Case C-118/96 *Safir* EU:C:1998:170, paras 34-35; Case C-390/96 *Lease Plan* EU:C:1998:206, para. 31ff; Case C-55/98 *Vestergaard* EU:C:1999:533, para. 14ff; Case C-176/96 *Lehtonen and Castors Braine* EU:C:2000:201, para. 37ff; Case C-251/98 *Baars* EU:C:2000:205, para. 22ff; Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* EU:C:2001:134, para. 38ff; *Gottardo* (n 3), paras 20-21; Case C-100/01 *Oteiza Olazabal* EU:C:2002:712, paras 24-25; Case C-422/01 *Skandia and Ramstedt* EU:C:2003:380, paras 61-62; Case C-289/02 *AMOK* EU:C:2003:669, paras 25-31; Case C-387/01 *Weigel* EU:C:2004:256, paras 58-59; Case C-306/03 *Salgado Alonso* EU:C:2005:44, paras 36-39; Case C-258/04 *Ioannidis* EU:C:2005:559, para. 37; Case C-222/04 *Cassa di Risparmio di Firenze* EU:C:2006:8, paras 99-100; Case C-185/04 *Öberg* EU:C:2006:107, para. 25; Case C-40/05 *Lyyski* EU:C:2007:10, para. 34ff; Case C-392/05 *Alevizos* EU:C:2007:251, para. 80; Case C-443/06 *Hollmann* EU:C:2007:600, para. 28ff; Case C-105/07 *Lammers & Van Cleeff* EU:C:2008:24, para. 14ff; Case C-311/08 *SGI* EU:C:2010:26, para. 31ff; Case C-384/08 *Attanasio Group* EU:C:2010:133, para. 36ff; Case C-240/10 *Schulz-Delzers and Schulz* EU:C:2011:591, para. 29ff; Joined Cases C-578/10 to C-580/10 *van Putten* EU:C:2012:246, para. 37ff; Case C-367/11 *Prete* EU:C:2012:668, para. 17ff; Case C-385/12 *Hervis Sport- és Divatkereskedelmi* EU:C:2014:47, paras 25-26; Case C-474/12 *Schiebel Aircraft* EU:C:2014:2139, paras 20-22; Case C-583/14 *Nagy* EU:C:2015:737, para. 24; Case C-492/14 *Essent Belgium* EU:C:2016:732, para. 118; Case C-296/15 *Medisanus* EU:C:2017:431, para. 62; Case C-566/15 *Erzberger* EU:C:2017:562, paras 25-27.

[41] *Hubbard* (n 40), para. 10.

[42] *Watson* (n 40), para. 22; *Van Ameyde* (n 40), para. 27.

[43] *Reyners* (n 3), para. 16; *Commission v Greece* (n 10), para. 12; *Masgio* (n 40), para. 13; *Perfili* (n 40), para. 15; *Metallgesellschaft and Others* (n 40), para. 39; *Weigel* (n 40), para. 58.

[44] *Baars* (n 40), para. 24.

[45] *Merci Convenzionali Porto di Genova* (n 40), para. 12; *Lehtonen and Castors Braine* (n 40), para. 38.

[46] *Mora Romero* (n 40), para. 11; *Vestergaard* (n 40), para. 17; *Lyyski* (n 40), para. 34; *Alevizos* (n 40), para. 66; *Attanasio Group* (n 40), para. 31; *Hervis Sport- és Divatkereskedelmi* (n 40), para. 25; *Schiebel Aircraft* (n 40), para. 21.

movement rules precludes the application of Article 18 TFEU, which 'applies independently only to situations governed by [EU] law in regard to which the Treaty lays down no specific prohibition of discrimination.'[47]

Where a situation can be resolved under one of the free movement rules, the inter-relationship between overlapping norms is quite clear cut. What is more equivocal is when Article 18 TFEU should apply given the ambiguities set out above over what it means to 'prejudice' the free movement rules. The ECJ does not discuss this point in any detail. However, several cases show how the ECJ approaches this issue in practice. In *Neukirchinger*, the ECJ was asked whether Article 18 TFEU applied to an Austrian rule requiring commercial balloon operators to hold an Austrian license. The case raises the meaning of the 'without prejudice' clause because, according to Article 58(1) TFEU, the '[f]reedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport'. In other words, would it prejudice the non-applicability of the rules on services to transport for the ECJ to rely on Article 18 TFEU in a situation concerning transport? The Austrian authorities had fined Mr Neukirchinger – the owner-operator of a hot air balloon company established and licensed in Germany – for offering flights in Austria.[48] It followed from Article 58(1) TFEU that Article 56 TFEU could not apply.[49] The Treaty rules on transport left the regulation of air transport to the Union legislature,[50] which had not adopted any legislation relating to 'non-power driven aircraft' i.e. hot air balloons.[51] The ECJ held that allowing Mr Neukirchinger to rely on Article 18 TFEU would not prejudice the more specific rules on services.[52]

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[47] *Masgio* (n 40), para. 12. See also *ASTI* (n 40), para. 10; *Merci Convenzionali Porto di Genova* (n 40), para. 11; *Scholz* (n 40), para. 6; *Vestergaard* (n 40), para. 16; *Baars* (n 40), para. 23; *Lehtonen and Castors Braine* (n 40), para. 37; *Metallgesellschaft and Others* (n 40), para. 38; *Oteiza Olazabal* (n 40), para. 25; *AMOK* (n 40), para. 26; *Weigel* (n 40), para. 57; *Cassa di Risparmio di Firenze* (n 40), para. 99; *Lyyski* (n 40), para. 33; *Hollmann* (n 40), para. 28; *Lammers & Van Cleeff* (n 40), para. 14; *UTECA* (n 5), para. 37; Case C-269/07 *Commission v Germany* EU:C:2009:527, para. 98; *SGI* (n 40), para. 31; *Attanasio Group* (n 40), para. 37; Case C-25/10 *Missionswerk Werner Heukelbach* EU:C:2011:65, para. 18; Case C-450/09 *Schröder* EU:C:2011:198, para. 28; *Schulz-Delzers and Schulz* (n 40), para. 29; *Prete* (n 40), para. 18; *Hervis Sport- és Divatkereskedelmi* (n 40), para. 25; *Schiebel Aircraft* (n 40), para. 20; *Medisanus* (n 40), para. 62; *Erzberger* (n 40), para. 25.

[48] Case C-382/08 *Neukirchinger* EU:C:2011:27, paras 12-16.

[49] *Neukirchinger* (n 48), para. 22.

[50] Article 100(2) TFEU specifies that '[t]he European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport. They shall act after consulting the Economic and Social Committee and the Committee of the Regions.'

[51] Council Regulation 2407/92 of 23 July 1992 on licensing of air carriers [1992] OJ L 240/1, Article 1(2).

[52] *Neukirchinger* (n 48), para. 28. See also Case C-628/11 *International Jet Management* EU:C:2014:171.

The ECJ does not approach all exclusions from the free movement rules in the same way. Where national rules concern employment in the public service, the Treaties use the language of exclusion: Articles 45 and 51 TFEU specify that the free movement rules '*shall not apply* to employment in the public service' and to activities 'connected, even occasionally, with the exercise of official authority' (emphasis added). *Prima facie*, similar to Article 58(1) TFEU, the wording of each of these provisions simply *excludes* the application of the free movement provisions rather than specifically *permitting* discrimination. In practice, however, the ECJ refers to Articles 45(4), 51 and 62 TFEU as 'exceptions to the principle of non-discrimination'.[53]

What would 'prejudice' an overlapping norm is thus something of a common sense determination. It would be illogical to apply Article 18 TFEU in situations where the very point is to allow Member States to appoint their nationals. In contrast, in *Neukirchinger,* applying Article 18 TFEU differs qualitatively from applying Article 56 TFEU since the Treaty rules on services also prohibit non-discriminatory restrictions on intra-EU movement i.e. measures that are 'liable to prohibit or otherwise impede the activities of a provider of services' in a host Member State.[54] As Horsley remarks in relation to *Neukirchinger,* the 'distinction between the *inapplicability* of … Article 56 TFEU and the *applicability* of Article 18 TFEU makes considerable sense'[55] as it excludes the ECJ's case law on non-discriminatory obstacles.[56]

ECJ case law also clarifies the meaning of the 'without prejudice' clause in situations where an applicant falls within the personal scope of one of the free movement rules, but the situation otherwise falls outside the material scope of those rules (and *vice versa*). *Ferlini,* for example, raised the question whether the free movement provisions exhaustively determine the equal treatment rights of migrant workers in a host Member State. A Union citizen working for the EU institutions and residing in a host Member State (Luxembourg) challenged his liability to pay higher-rate hospital fees than

[53] *Sotgiu* (n 7), para. 4. See also *ASTI* (n 40), para. 19; *Colegio de Oficiales de la Marina Mercante Española* (n 20), para. 41; Case C-47/02 *Anker* EU:C:2003:516, para. 60. *Alevizos* (n 40), para. 69; Case C-281/06 *Jundt* EU:C:2007:816, para. 36.
[54] *Säger* (n 37), para. 12.
[55] T Horsley, 'Case Comment on *Neukirchinger*' (2012) 49(2) *CMLRev* 737, 745 (emphasis in original).
[56] Horsley (n 55) 745.

nationals (as an EU official he did not pay into the Luxembourg system for healthcare). The Court began by confirming that Mr Ferlini fell within personal scope of the Treaties as a worker and that 'a worker who is a Member State national, such as Mr Ferlini, may not be refused the rights and social advantages which Article [45 TFEU] … affords him'.[57] However, he was unable to rely on the rules concerning the free movement of workers because 'the application of scales of fees for medical and hospital maternity care which are higher than those applicable to persons affiliated to the national social security scheme cannot be characterised as a condition of work within the meaning of Article [45(2) TFEU]'.[58] The ECJ thus had to determine whether it would it prejudice the outer limits of Article 45 TFEU – which did not cover the scale of hospital fees – to allow Mr Ferlini to rely on Article 18 TFEU. Martin argues that it would essentially undermine the limits in the free movement provisions (limits concerning who can claim equal treatment and for what) to allow Mr Ferlini to rely on Article 18 TFEU.[59] He argues that Article 18 TFEU is not 'independently applicable to employed persons, since they are covered by Article [45 TFEU] which specifically applies the principle of non-discrimination to them'.[60]

The ECJ in *Ferlini* did not follow the approach suggested by Martin. After concluding that 'it is clear that … Article [45 TFEU] is [not] applicable in the present case',[61] the ECJ then held that 'the question relating to the alleged discrimination must be examined in the light of [Article 18 TFEU].'[62] What is implicit in the ECJ's decision is that it does not 'prejudice' Article 45 TFEU to rely on Article 18 TFEU in this situation. The fact that the Treaty rules on workers do not include a right to the same level of hospital fees is thus not interpreted as meaning that discrimination is expressly permitted in that area. This determination makes sense since it would otherwise undermine the gap-filling nature of Article 18 TFEU. Martin's concerns over the application of Article 18 TFEU perhaps reflect unease over what falls within the scope of EU law in a much more

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[57] *Ferlini* (n 22), para. 43.
[58] *Ferlini* (n 22), para. 45.
[59] D Martin, 'Case Comment on *Ferlini, Elsen, Osterreichischer Gewerkschaftsbund, Borawitz* and *Hocsman*' (2001) 3(2) *European Journal of Migration and Law* 257, 260.
[60] Martin (n 59) 259.
[61] *Ferlini* (n 22), para. 46.
[62] *Ferlini* (n 22), para. 47.

general sense. In *Ferlini*, there is some uncertainty over whether national rules on the fixing of hospital fees fall within the material scope of the Treaties.[63]

A point which the ECJ has not clarified is whether it would 'prejudice' the overlapping free movement rules to rely on Article 18 TFEU in horizontal situations. As outlined above, Article 18 TFEU applies to private actors exercising a 'certain power over individuals', whereas the capacity for Articles 34, 35 and 63(1) TFEU to apply in disputes between private individuals is (according to existing case law) more limited. Wyatt argues that Article 18 TFEU might apply residually in cases 'involving the exercise of fundamental freedoms, in particular as regards discrimination on grounds of nationality in the supply of goods, services, business premises and housing'.[64] In his opinion, such an approach would 'reinforce fundamental freedoms and be conducive to achieving the aims of the internal market, without placing excessive burdens on private operators.'[65] The ECJ is yet to rule on Wyatt's proposal. What is not clear is whether it would 'prejudice' the ECJ's determination regarding the actors which are subject to the free movement rules. For example, according to ECJ case law on the free movement of goods, 'all rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions'.[66] If a private actor of the collective or regulatory type (outside of those covered by the ruling in *Fra.bo*[67]) restricts the free movement goods, would it prejudice the ECJ's interpretation of Article 34 TFEU to allow and applicant to rely on Article 18 TFEU?

Discussion now turns to an alternative approach to the inter-relationship between overlapping norms adopted by the ECJ in a small number of cases.

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[63] See Prechal, de Vries and van Eijken (n 5); AP van der Mei, 'The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality: A Look through the Lens of Union Citizenship' (2011) 18(1-2) *MJ* 62.
[64] D Wyatt, 'Horizontal Effect of Fundamental Freedoms and the Right to Equality after *Viking* and *Mangold*, and the Implications for Community Competence' (2008) 4 *CYELP* 1, 15. See also Karayigit (n 24) 333.
[65] Wyatt (n 64) 15.
[66] *Dassonville* (n 25), para. 5.
[67] As discussed above (see Section 2.1, especially n 29), the implications of the ECJ's decision in *Fra.bo* remain unclear.

2.4. ECJ Practice Inconsistent with the 'Without Prejudice' Clause: Examining Article 18 TFEU Before the Treaty Freedoms

In a cluster of cases relating to national procedural rules, the ECJ adopts a different approach to the inter-relationship between Article 18 TFEU and overlapping free movement provisions. Contrary to what the 'without prejudice' clause implies, and in contrast to the extensive body of case law set out above, in this line of case law the ECJ treats Article 18 TFEU and the free movement provisions as inter-changeable.

In a line of cases starting with *Phil Collins,* the ECJ offers a different interpretation of the 'without prejudice' clause from the understanding set out above (and followed in the vast majority of cases). What characterises the cases discussed here is that each concerns the legality of different national procedural rules. In *Phil Collins*, a national law offered non-national performers seeking to enforce their intellectual property rights lesser procedural protection; specifically, the performers, as non-nationals, were not granted an interim injunction.[68] The remaining cases concerned a requirement for non-nationals to furnish security for costs in court proceedings.[69] In each case the ECJ considered that the national rules in question engaged the free movement provisions.[70] The ECJ recognised in *Phil Collins,* for example, that rights to artistic property 'are subject … to the provisions … *relating to* the free movement of goods'[71] and that 'the activities of copyright management societies are subject to the provisions … *relating to* the freedom to provide services.'[72] However, in none of the cases did the ECJ go on to determine whether the free movement provisions preclude the national procedural rules.

What the ECJ does, instead, is to suggest that there is no need to first establish whether the free movement rules apply. According to the ECJ:

> … national legislative provisions which fall within the scope of application of the Treaty are, by reason of their effects on intra-[EU] trade in goods and services, necessarily subject to the general principle of non-discrimination laid down by

[68] *Phil Collins* (n 18), paras 3-10.
[69] Case C-43/95 *Data Delecta Aktiebolag and Forsberg* EU:C:1996:357, para. 4; *Hayes* (n 17), paras 2-4; Case C-122/96 *Saldanha and MTS* EU:C:1997:458, paras 4-7.
[70] *Data Delecta* (n 69), para. 13; *Hayes* (n 17), para. 14; *Saldanha and MTS* (n 69), para. 17.
[71] *Phil Collins* (n 18), para. 23 (emphasis added).
[72] *Phil Collins* (n 18), para. 24 (emphasis added). See also Case C-360/00 *Ricordi* EU:C:2002:346.

> [Article 18 TFEU], without there being any need to connect them with the specific provisions [concerning goods and services].[73]

By referencing the free movement provisions, the ECJ indicates that they apply. However, contradicting the large number of cases set out above, the ECJ then concludes there is no need to determine this point as Article 18 TFEU can apply instead.

Ackermann argues that in *Phil Collins,* as well as in the cases following, 'the ECJ certainly did not intend to take the position that the general prohibition of discrimination on grounds of nationality prevails over the specific provisions on the fundamental freedoms.'[74] Perhaps such phrasing would be too strong. What the ECJ's decision does is remove the necessity of determining which fundamental freedom applies and establishing whether the national measure is precluded by that freedom. The ECJ instead enables applicants to have recourse directly to Article 18 TFEU. Showing the impact of the ECJ's reasoning in *Phil Collins*, Advocate General Cosmas considered that in that case the ECJ 'chang[ed] to some extent its position regarding the "ancillary" nature of the first paragraph of Article [18 TFEU]'.[75] It is submitted that the ECJ in these cases does not rely on the 'without prejudice' clause to structure the inter-relationship between Article 18 TFEU and overlapping Treaty provisions; the ECJ's decision instead implies that there is no need to reach any conclusions on the basis of the free movement rules where Article 18 TFEU can apply instead. If the free movement rules do not cover the situation, which is *otherwise* within the scope of application of Union law, the ECJ needs to clarify this point.

One might question whether the ECJ's application of Article 18 TFEU over the free movement provisions matters. Ackermann considers that 'as long as the standards applied under Article [18 TFEU] are not stricter than those applied under the fundamental freedoms, drawing the line between these two areas is no matter of prime

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[73] *Data Delecta* (n 69), para. 14. See also *Phil Collins* (n 18), para. 27; *Hayes* (n 17), para. 16; *Saldanha and MTS* (n 69), para. 17.
[74] Ackermann (n 16) 792.
[75] Case C-412/97 *ED* EU:C:1999:20, Opinion of AG Cosmas, para. 31.

importance.'[76] The ECJ does itself acknowledge this point. In *Huber,* for example, the ECJ refers to how:

> … the order for reference does not contain any detailed information which would allow it to be established whether the situation at issue in the main proceedings is covered by Article [49 TFEU]. However, even if the national court were to consider that to be the case, the application of the principle of non-discrimination cannot vary depending on whether it finds its basis in that provision or on Article [18 TFEU].[77]

As set out above, the concept of discrimination on grounds of nationality is common to the free movement provisions and Article 18 TFEU.

Article 18 TFEU is not, however, always inter-changeable with the overlapping free movement provisions. The free movement rules are, in one sense, broader than Article 18 TFEU as they also prohibit non-discriminatory restrictions on free movement. By relying directly on Article 18 TFEU *without first explaining why the free movement provisions do not apply,* the ECJ potentially prevents an applicant from enjoying the more wide-ranging rules in the Treaty freedoms. Conversely, the framework for justifying discriminatory measures under Article 18 TFEU potentially differs from that under the free movement provisions.

Examining Article 18 TFEU without concluding whether the contested measure complies with or is contrary to the free movement rules requires a *contra legem* interpretation of the Treaties. The 'without prejudice' clause in the Treaty prioritises the free movement rules – as more specific provisions – where they apply. Furthermore, the ECJ's approach in these cases departs from the logic of the 'without prejudice' clause, which itself reflects the *lex specialis* principle. As will be recalled from Chapter 2, the rationale underpinning the *lex specialis* principle is to reflect more accurately the intentions of the legislature[78] and to ensure the application of the more efficacious norm.[79] The free movement rules, which set out in greater detail what amounts to a

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[76] Ackermann (n 16) 793.
[77] *Huber* (n 17), para. 74.
[78] Michaels and J Pauwelyn, 'Conflict of Norms or Conflict of Laws: Different Techniques in the Fragmentation of Public International Law' (2011-2012) 22(3) *Duke Journal of Comparative & International Law* 349, 354. See also, J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (CUP 2003) 388; A Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*' (2005) 74(1) *NJIL* 27, 42.
[79] D Pulkowski, *The Law and Politics of International Regime Conflict* (OUP 2014) 324.

restriction and what is a permissible limitation will offer more precise guidance to the ECJ than Article 18 TFEU.

Furthermore, adopting this approach could lead to legal uncertainty. The ECJ avoids defining the outer edges of the fundamental freedoms, leading to potential confusion over what does fall within their scope. For example, in *Hubbard,* a case also relating to national procedural rules, the ECJ held that those rules fell within the scope of the Treaty rules on services. What is not clear is why the situation in *Hubbard* fell within the scope of Article 56 TFEU. Like the contested rule in *Data Delecta*, *Hayes* and *Saldanha* , the case concerned a requirement that only those established in another Member State must furnish security for legal costs.[80] Why is Article 56 TFEU applied in *Hubbard,* but recourse to Article 18 TFEU is necessary – or at least preferred – in the other cases?

2.5. Summary

This Section assessed how the ECJ resolves overlaps between Article 18 TFEU and the free movement provisions, in practice, against the expected meaning of the 'without prejudice' clause in Article 18 TFEU. What extensive case law analysis shows is that the ECJ almost always relies on that clause to prioritise the free movement provisions. Furthermore, the ECJ explicitly refers to the 'without prejudice' clause making express the role played by that clause in mediating the inter-relationship between norms. Precisely when recourse to Article 18 TFEU is will prejudice an overlapping norm remains somewhat ambiguous due to uncertainties over where the outer-edges of the free movement rules lie and what measures are caught by those rules. Greater clarity in that regard would make whether Article 18 TFEU applies more predictable.

Case law research also highlighted a minority of cases in which ECJ practice does not fit with respect for the 'without prejudice' clause. In the line of cases following *Phil Collins*, the ECJ suggests that there is no need to establish whether one of the more specific free movement rules applies before considering Article 18 TFEU. However, not only does this approach have the potential to affect the outcome of the case as well as lead to

[80] *Hubbard* (n 40), para. 9.

uncertainty over the scope of the free movement rules, it is also *contra legem* an express clause in the Treaties.

3. OVERLAPS BETWEEN THE CHARTER AND THE TREATIES

3.1. Overview

Discussion now turns to assess the ECJ's approach to overlaps between provisions of the Treaty and the Charter. Of key importance here is Article 52(2) CFR, which mediates the Charter's relationship with the Treaties and provides that the "[r]ights recognised by this Charter for which provision is made in the Treaties *shall be exercised under the conditions and within the limits defined by those Treaties*' (emphasis added).

3.2. Case Study: Overlaps between Article 21(2) CFR and the Treaties

Prima facie, Article 21(2) CFR is identical to Article 18 TFEU and states that '[w]ithin the scope of application of the Treaties and *without prejudice to any of their specific provisions*, any discrimination on grounds of nationality shall be prohibited'.[81] This Section considers three possible ways in which Article 21(2) CFR may diverge from Article 18 TFEU, despite barely perceptible differences in how the right is framed. These are: (1) by applying to third country nationals; (2) by applying in disputes between individuals; and (3) by setting out a different justification regime.

To start, let us first outline the similarities between Article 21(2) CFR and overlapping Treaty provisions prohibiting nationality discrimination. At the core of Article 21(2) CFR, as with the overlapping Treaty provisions, is the prohibition on direct and indirect discrimination on grounds of nationality.[82] More specifically, what suffices to trigger Article 18 TFEU (i.e. falls within the scope of the Treaties) is likely coterminous with the scope of application of Article 21(2) CFR following the ECJ's broad interpretation of Article 51(1) CFR, which determines the Charter's field of application.[83]

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[81] Emphasis added to highlight the contrast with Article 18 TFEU which prohibits nationality discrimination '[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein'.
[82] C Kilpatrick, 'Non-Discrimination' in S Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 579-604, para. 21.45.
[83] See e.g. M Dougan, 'Judicial Review of Member State Action under the General Principles and the Charter: Defining the "Scope of Union Law"' (2015) 52(5) *CMLRev* 1201.

Turning to the potential differences between Article 21(2) CFR and the overlapping Treaty framework, Article 21(2) CFR may offer greater protection by extending to (some) third-country nationals. The text of Articles 18 and 45 TFEU and Article 21(2) CFR does not limit their application to EU citizens (in contrast to Articles 49 and 56 TFEU).[84] However, the ECJ interprets Articles 18 and 45 TFEU as excluding third country nationals from their scope.[85] It has been questioned whether Article 21(2) CFR, in keeping with the nature of the Charter as a human rights document, might allow challenges to differential treatment between EU citizens and third-country nationals.[86] This is especially so since Article 21(2) CFR applies 'within the scope of application of the Treaties' and, as Muir points out '[i]t can hardly be questioned that today's Treaty is to a large extent applicable to the situation of third-country nationals. Moreover, the authors of the Treaty actually intended to expand its scope in that direction.'[87] And, as a result of the extensive EU legislative framework specifically addressing non-EU nationals,[88] eighty per cent of third-country nationals in the EU now fall within the scope of secondary Union law.[89]

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[84] Articles 49 and 56 TFEU both refer to 'nationals of a Member State in the territory of another Member State' and 'nationals of Member States who are established in a Member State other than that of the person for whom the services are intended' respectively.

[85] Joined Cases C-22/08 and C-23/08 *Vatsouras* EU:C:2009:344, paras 52-53; Case C-45/12 *Hadj Ahmed* EU:C:2013:390, paras 40-41.

[86] Kilpatrick (n 82), paras 21.32-39. This point was raised in Case C-571/10 *Kamberaj* EU:C:2012:233, para. 55. However, the ECJ decided the case on the basis of Article 34 CFR. For a comprehensive argument as to why Article 18 TFEU should be extended to third-country nationals, see C Hublet, 'The Scope of Article 12 of the Treaty of the European Communities vis-à-vis Third-Country Nationals: Evolution at Last?' (2009) 15(6) *ELJ* 757.

[87] E Muir, 'Enhancing the Protection of Third-Country Nationals against Discrimination: Putting EU Anti-Discrimination Law to the Test' (2011) 18 *MJ* 136, 143

[88] See e.g. Council Regulation 859/2003 of 14 May 2003 extending the provisions of Regulation 1408/71 and Regulation 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality [2003] OJ L 124/1; Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12; Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L 16/44; Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L 155/17; Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] OJ L 343/1; Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L 94/375; Directive 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing [2016] OJ L 132/21.

[89] This statistic comes from Muir (n 87) 139 citing Groenendijk, 'Citizens and Third Country Nationals:

Secondly, Article 21(2) CFR may enhance protection from discrimination in horizontal situations. As discussed above, although applicants may rely on Article 45 TFEU against private individuals, Article 18 TFEU and the Treaty rules on services and establishment are only invokable against private actors of a collective or regulatory nature. Importantly, the ECJ in *Egenberger* recently suggested that Article 21(2) might be applicable in disputes concerning 'contracts between individuals'[90] without the qualification that one actor is of a collective or regulatory nature. *Egenberger* concerned Article 21(1) CFR, but the reasoning could apply to Article 21(2) CFR. The ECJ built upon earlier case law requiring that, to apply horizontally, a Charter right is 'sufficient in itself to confer on individuals an individual right which they may invoke' in horizontal disputes.[91] As Articles 18 TFEU can be invoked in (some) disputes between private parties, the prohibition on nationality discrimination in Article 21(2) CFR likely meets this threshold. When applying Article 21(1) CFR to a contract between individuals, the ECJ in *Egenberger* cited the 'mandatory' nature of that Charter right as the reason for its horizontal effect.[92] Other provisions considered 'mandatory' by the ECJ include Articles 18 and 45 TFEU[93] suggesting that Article 21(2) CFR would meet this threshold.

Thirdly, a potential divergence between Article 21(2) CFR and overlapping Treaty provisions emerges regarding the permissible limits to the prohibition on nationality discrimination. As discussed in Chapter 3, Article 52(1) CFR sets out the possibility of derogating from Charter rights. According to that provision:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

Differential Treatment or Discrimination' in J Carlier and E Guild, *The Future of Free Movement of Persons in the EU* (Bruylant 2006) 85.

[90] Case C-414/16 *Egenberger* EU:C:2018:257, para. 77.

[91] Case C-176/12 *Association de médiation sociale* EU:C:2014:2, para. 47.

[92] *Egenberger* (n 90), paras 76-77.

[93] *Egenberger* (n 90), para. 77. Indeed, one might even question whether the ECJ intended to refer to Article 21(2) CFR as well as Article 21(1) CFR by referring just to 'Article 21 of the Charter' in *Egenberger* (although the facts of the case only engaged Article 21(1) CFR).

In one sense, Article 52(1) CFR appears to set a more stringent threshold for justification than previously set out in the ECJ's case law. Under the free movement provisions and Article 18 TFEU, indirectly discriminatory measures are capable of justification if the measure aims to secure a legitimate objective, is appropriate for achieving that objective, and does not go beyond what is necessary. To limit rights under the Charter, Article 52(1) CFR adds two additional criteria: the contested measure must be 'provided for by law' and must 'respect the essence' of the Charter right. The Charter potentially provides an additional hurdle for justifying measures which discriminate on grounds of nationality. In another sense, Article 52(1) CFR offers less protection since it applies to 'any limitation' and so could potentially be relied upon to justify directly discriminatory measures. In contrast, under the free movement provisions direct discrimination is only permissible by having recourse to one of the express derogations while it is unlikely that directly discriminatory measures can be justified under Article 18 TFEU.

To sum up briefly, in theory, Article 21(2) CFR could diverge from the Treaty framework. The discussion above is, however, dependent on how the ECJ interprets Article 52(2) CFR and the 'without prejudice' clause in practice.

3.3. Article 52(2) CFR and the 'Without Prejudice' Clause

Two distinct priority clauses regulate the inter-relationship between Article 21(2) CFR and overlapping Treaty provisions. The first, identical to that in Article 18 TFEU, grants priority to more specialised overlapping Treaty provisions: Article 21(2) CFR is 'without prejudice to … specific provisions' in the Treaties. In theory, the 'without prejudice' clause in Article 21(2) CFR should mimic the operation of the same clause in Article 18 TFEU. When one of the free movement provisions applies in a given situation, the expectation is thus that this will preclude the application of Article 21(2) CFR just as it precludes the application of Article 18 TFEU.

What is more complex is the inter-relationship between Article 18 TFEU and Article 21(2) CFR. The equivalence of the two provisions removes the possibility of relying on

the principle of *lex specialis* as codified by the 'without prejudice' clause.[94] Instead, the key provision mediating their inter-relationship is Article 52(2) CFR, which – rather than adopting the wording commonly used in priority clauses such as 'shall not affect', 'without prejudice', 'subject to'[95] – specifies that '[r]ights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.' The Explanations – to which due regard must be had when interpreting the Charter[96] – clarify that Article 52(2) CFR:

> … refers to rights which were already expressly guaranteed in the Treaty establishing the European Community and have been recognised in the Charter, and which are now found in the Treaties (notably the rights derived from Union citizenship). It clarifies that such rights remain subject to the conditions and limits applicable to the Union law on which they are based, and for which provision is made in the Treaties. The Charter does not alter the system of rights conferred by the EC Treaty and taken over by the Treaties.[97]

In addition, the Explanation relating to Article 21(2) CFR, that provision 'must be applied in compliance with [Article 18 TFEU].'[98]

Chapter 3 discussed the meaning of Article 52(2) CFR when a Charter right coincides with one of the legislative bases in the Treaties. The interpretation will differ here, however, given the overlap is with a directly equivalent Treaty right. In this context, there are three possible interpretations of Article 52(2) CFR: first, a narrow view, which restricts the application of Article 52(2) CFR to specific Treaty provisions that are subject to limits defined by Union secondary law, second, a middle view, focusing on the continued application of Article 52(1) CFR; finally, a broad view according to which Article 52(2) CFR essentially subjugates Article 21(2) CFR to the Treaties. The following discussion seeks to present each possible interpretation in its best light and concludes that the only feasible interpretation of Article 52(2) CFR is the third option (the broad view).

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[94] According to Rossi, '[i]f the Charter and the Treaty had the same status, the former, as *lex specialis*, should trump the latter', see LS Rossi, 'Same Legal Value as the Treaties: Rank, Primacy, and Direct Effects of the EU Charter of Fundamental Rights' (2017) 18(4) *GLJ* 771, 775. For a contrasting view arguing that the Treaties are *lex specialis*, see R Schütze, 'Three "Bills of Rights" for the European Union' (2011) 30(1) *YEL* 131, 149.
[95] See Chapter 2, Section 3.2.
[96] Article 52(7) CFR.
[97] Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/17, 33.
[98] Explanations (n 97) 24.

The 'narrow view' would mean that Article 52(2) CFR does not apply to the inter-relationship between Article 18 TFEU and Article 21(2) CFR. Under this interpretation, Article 52(2) CFR only applies to Charter rights where the overlapping Treaty provision is explicitly subject to limitations in Union secondary law. Support for this view is found in the Explanations to Article 52(2) CFR, which draw a link to Union citizenship and the specific references to Article 52(2) CFR in the Explanations to Articles 39, 40, 41(3)-(4), 43, 44 and 45 CFR all of which concern Union citizenship. Articles 20 and 21(1) TFEU on the rights of Union citizens set up an inverse hierarchy according to which the rights of Union citizens are to be 'exercised in accordance with' and 'subject to the limitations and conditions laid down in the Treaties *and by the measures adopted to give them effect*.' By focusing on the express relevance of Article 52(2) CFR for Union citizenship rights one can argue for a more limited reading of that provision.[99]

However, the difficulty with the above reading of Article 52(2) CFR is that it involves a selective reading of the Explanations. Focusing on specific mentions of Article 52(2) CFR prioritises these individual references over the resounding conclusion that the 'Charter does not alter the system of rights conferred by the EC Treaty and taken over by the Treaties' in the Explanations to Article 52(2) CFR. It also overlooks the explicit link drawn between Article 18 TFEU and Article 21(2) CFR in the Explanations, according to which the latter 'must be applied in compliance with' the former.

The second interpretation of Article 52(2) CFR focuses of the continued relevance of Article 52(1) CFR (setting out the limits on limits to the Charter). Where both Article 52(1) CFR and Article 52(2) CFR are engaged, does Article 52(1) still apply? If so, Article 21(2) CFR could provide an additional level of scrutiny; even where a discriminatory measure complies with Article 18 TFEU, it would still need to comply

[99] Furthermore, the Explanations to Articles 15(3), 23, 42 and 46 CFR each refer to Article 52(2) CFR. Article 42 CFR (on the right to access to documents) corresponds with Article 15(3) TFEU according to which '[g]eneral principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.' Likewise, Article 15(3) CFR (on working conditions of third country nationals) corresponds with Article 153 TFEU, which empowers the EU to act to 'support and complement the activities of the Member States [relating to the] conditions of employment for third-country nationals legally residing in Union territory'. Finally, Article 23 CFR (on sex discrimination) overlaps with Article 157(4) TFEU both of which allow for legislative measures that aim to promote sex equality i.e. positive discrimination.

with Article 52(1) CFR. Article 52 CFR does not set out a hierarchy between provisions leaving the matter to the ECJ.[100] One can argue that Article 52(1) applies to '*any* limitation'[101] and not only those where Article 52(2) CFR does not also apply. This argument is unpersuasive as it overlooks the *lex specialis* nature of Article 52(2) CFR. In contrast to Article 52(1) CFR, which sets out general guidance for justifying limits on Charter rights, Article 52(2) CFR specifies the role of the Charter where an overlapping Treaty provision exists. Furthermore, if one interprets Article 52(1) CFR as applying to all limitations on Charter rights it would potentially lead to a reduction in existing protections, something the Charter express aims of 'codification' would seem to rule out.

This takes us to the third view and the view preferred by the academic literature.[102] On this view, Article 52(2) CFR mediates the inter-relationship between Article 18 TFEU and Article 21(2) CFR. However, it does not operate in the same manner as the 'without prejudice' clause. If it did, the applicability of Article 18 TFEU would preclude the application of Article 21(2) CFR. Linking to the situations outlined above, it would still permit recourse to Article 21(2) CFR in situations involving third-country nationals and potentially in contractual disputes between individuals (but not if the justificatory framework differed). The weight of evidence suggests that Article 52(2) CFR intended to pre-empt *any* independent application or added value of Article 21(1) CFR. The reasons are threefold: first, the aims behind the Charter strongly imply that it intended to codify and not alter existing Treaty rights. According to the Preamble, the Charter aims to 'reaffirm' existing rights and make those rights 'more visible'.[103] Secondly, viewing Article 52 CFR as a whole, Article 52(2) CFR – unlike Article 52(3) – does not include the possibility that the Charter might provide for 'more extensive protection'.[104]

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[100] Discussing the relationship between Articles 52(1) and 52(2) CFR, Peers and Prechal outline 'three possible conflict rules: one of the two paragraphs could apply exclusively; two paragraphs could apply simultaneously, with the Charter right interpreted on the basis of the lowest common denominator (this could be described as a 'lower standards' approach); or the paragraphs could apply simultaneously with the most stringent interpretation rules applying (the 'higher standards' approach)', see S Peers and S Prechal, 'Scope and Interpretation of Rights and Principles' in S Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 1455-1522, para. 52.208.

[101] Peers and Prechal (n 100), para. 52.213.

[102] K Lenaerts and E de Smijter, 'A "Bill of Rights" for the European Union' (2001) 38 *CMLRev* 273, 282; Schütze (n 94) 149.

[103] Recital 4.

[104] Peers and Prechal (n 100), para. 52.213.

Finally, the original rationale for including Article 52(2) CFR was to ensure that the Charter did not affect the Treaties. The Working Group on 'Incorporation of the Charter/ accession to the ECHR' describe the 'consensus… that the legal situation as defined by the EC Treaty should remain unaffected by the Charter'[105] and describes Article 52(2) CFR as a 'referral clause' that ensures 'complete compatibility between the statements of the rights in the Charter and their more detailed regulation as currently found in the EC Treaty'.[106]

Discussion now turns to assess how the ECJ interprets the inter-relationship between Article 21(1) CFR and overlapping Treaty provisions in practice.

3.4. ECJ Practice Consistent with the 'Without Prejudice' Clause and Article 52(2) CFR

The main finding presented here is that, in the context of an overlap between Article 21(2) CFR and Treaty provisions prohibiting nationality discrimination, ECJ practice coheres with the approach set out above.

Overlaps between Article 21(2) CFR and the free movement rules arose in twenty-nine cases.[107] ECJ practice fits with respect for the 'without prejudice' clause in all cases. Where the ECJ determines that the contested measure falls foul of the free movement rules and amounts to an unjustified restriction on intra-EU movement, the ECJ does not turn to consider Article 21(2) CFR.[108] As expected given the *lex specialis* nature of the

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[105] Convention, 'Final Report of Working Group II on incorporation of the Charter and accession to the ECHR' (CONV 354/02) 6.
[106] CONV 354/02, 6.
[107] Only those cases falling within the temporal scope of the Charter – i.e. where the factual situation arose after the entry into force of the Lisbon Treaty – were analysed. Relevant cases were identified by searching the database of the Court of Justice of the EU (curia.eu) by provision i.e. Articles 34, 35, 45, 49, 46 and 63(1) TFEU. Case law is up to date as of 16 July 2018.
[108] Case C-514/12 *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken* EU:C:2013:799, para. 45; *Hervis Sport- és Divatkereskedelmi* (n 40), para. 45; Case C-481/12 *Juvelta* EU:C:2014:11, para. 34; Joined Cases C-53/13 and C-80/13 *Strojírny Prostějov* EU:C:2014:2011, paras 60-61; Case C-423/13 *Vilniaus energija* EU:C:2014:2186, para. 56; Case C-333/14 *Scotch Whisky Association and Others* EU:C:2015:845, para. 50; Case C-148/15 *Deutsche Parkinson Vereinigung* EU:C:2016:776, para. 27; Case C-114/15 *Audace and Others* EU:C:2016:813, para. 75; Case C-525/14 *Commission v Czech Republic* EU:C:2016:714, para. 69; *Medisanus* (n 40), para. 104; Case C-509/12 *Navileme and Nautizende* EU:C:2014:54, para. 24; *Schiebel Aircraft* (n 40), para. 29; *Nagy* (n 40), para. 37; Case C-420/15 *U* EU:C:2017:408, para. 31; Case C-20/16 *Bechtel* EU:C:2017:488, para. 80; Case C-651/16 *DW* EU:C:2018:162, para. 38; Case C-3/17 *Sporting Odds* EU:C:2018:130, para. 68; *SEGRO* (n 14), para. 75; Case C-466/15 *Adrien and Others* EU:C:2016:749, para. 38; Case C-392/15 *Commission v Hungary* EU:C:2017:73, para. 143; C-300/15 *Kohll and Kohll-Schlesser*

free movement rules and the 'without prejudice' clause in Article 21(2) CFR, there is no mention of Article 21(2) CFR. Furthermore, as the Charter aims – at a minimum – to codify the existing level of rights protection in the EU it would be contrary to the logic underpinning the Charter to 'rescue' a national measure already found contrary to the Treaty. When the ECJ concludes that the contested measure is non-discriminatory or otherwise justified,[109] the ECJ does not then turn to consider Article 21(2) CFR. As such, the Charter does not act as an additional layer of scrutiny here.

Overlaps arose between Article 18 TFEU and Article 21(2) CFR in six cases.[110] In line with the understanding of Article 52(2) CFR set out above, the ECJ does not turn to assess Article 21(2) CFR after finding that a national measure is contrary to Article 18 TFEU.[111] Admittedly, only one case – *Rüffer* – has arisen on the point so far and Article 21(2) CFR was not mentioned. Had a party to the proceedings argued that the contested measure could be 'saved' by relying on Article 21(2) CFR, *Pfleger* provides an indication as to how the ECJ would respond. *Pfleger* concerned a national law on the pre-authorisation of gambling machines and the compatibility of those pre-authorisation rules with EU law. It was alleged, first, that the national rules might be contrary to free movement law and, secondly, that the national rules infringed the freedom to conduct a business and the right to property enshrined in Articles 15-17 CFR. The ECJ began by analysing the Treaty rules on services[112] and strongly suggested that the national rule was disproportionate to the aim pursued.[113] The ECJ then turned to consider the arguments relating to the Charter. Dismissing the possibility that the national measure might comply with the Charter, the ECJ held that:

EU:C:2016:361, para. 63; Case C-515/14 *Commission v Cyprus* EU:C:2016:30, para. 58; Case C-317/14 *Commission v Belgium* EU:C:2015:63, para. 35; Case C-168/14 *Grupo Itevelesa and Others* EU:C:2015:685, para. 84; Case C-151/14 *Commission v Latvia* EU:C:2015:577, para. 77; Case C-25/14 *UNIS* EU:C:2015:821, para. 46; Case C-344/13 *Blanco* EU:C:2014:2311, para. 48; Joined Cases C-39/13 to C-41/13 *SCA Group Holding* EU:C:2014:1758, para. 56;

[109] *Erzberger* (n 40), para. 41; Case C-195/16 *I* EU:C:2017:815, para. 79; Case C-496/15 *Eschenbrenner* EU:C:2017:152, para. 59; Case C-68/15 *X* EU:C:2017:379, para. 61; Case C-50/14 *CASTA and Others* EU:C:2016:56, para. 67; Case C-512/13 *Sopora* EU:C:2015:108, para. 36; Case C-342/15 *Piringer* EU:C:2017:196, para. 71

[110] This Section only considers cases falling outside the scope of the free movement provisions.

[111] Case C-322/13 *Grauel Rüffer* EU:C:2014:189, para. 27

[112] Case C-390/12 *Pfleger and Others* EU:C:2014:281, para. 39.

[113] *Pfleger and Others* (n 112), para. 54.

> … an unjustified or disproportionate restriction of the freedom to provide services under Article 56 TFEU is also not permitted under Article 52(1) of the Charter in relation to Articles 15 to 17 of the Charter.[114]

What is strongly implied by the ECJ is the redundancy of the Charter where there is an overlapping Treaty provisions. Clarifying the role of the Charter here, the ECJ ruled that:

> … an examination of the restriction represented by the national legislation at issue in the main proceedings from the point of view of Article 56 TFEU covers also possible limitations of the exercise of the rights and freedoms provided for in Articles 15 to 17 of the Charter, so that a separate examination is not necessary.[115]

Nic Shuibhne refers to this as an 'absorptive effect' as what amounts to an unjustified restriction on free movement under the Treaty is also an unjustified restriction of the overlapping Charter right.[116]

In the remaining cases, the ECJ finds that the contested national measure is not contrary to Article 18 TFEU.[117] After reaching this conclusion the ECJ does not then assess whether Article 21(2) CFR might offer an *additional* layer of protection. For example, in *Commission v Netherlands,* the Commission brought infringement proceedings against the Netherlands for refusing to grant EU migrant students travel allowances granted to Dutch nationals. The case turned on the interpretation of Article 24(2) of Directive 2004/38,[118] according to which:

> … the host Member State shall not be obliged … to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

The ECJ recognised that 'Article 24(2) is a derogation from the principle of equal treatment provided for in Article 18 TFEU' and so 'must be interpreted narrowly'.[119]

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114 *Pfleger and Others* (n 112), para. 59.
115 *Pfleger and Others* (n 112), para. 60.
116 N Nic Shuibhne, 'Integrating Union Citizenship and the Charter of Fundamental Rights' in D Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart 2017) 209-240, 214.
117 Case C-67/14 *Alimanovic* EU:C:2015:597, paras 57-58; Case C-299/14 *García-Nieto* EU:C:2016:114, paras 40-51; Case C-233/14 *Commission v Netherlands* EU:C:2016:396, para. 86.Case C-182/15 *Petruhhin* EU:C:2016:630, para. 50; Case C-191/16 *Pisciotti* EU:C:2018:222, para. 56.
118 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77.
119 *Commission v Netherlands* (n 117), para. 86.

The suggestion is that the provision is compatible with Article 18 TFEU and the remainder of the analysis focuses on whether the contested national measure falls within that derogation.[120]. No mention is made of Article 21(2) CFR.[121] The implication of this case law is therefore that: measures compatible with the Treaty will also be compatible with the Charter.

Supporting this reading of the case law, the ECJ examined an argument that the Charter might offer an additional layer of protection on top of overlapping Treaty rights in *ONEm and M.* After finding that the contested measure complied with Article 45 TFEU, the ECJ then went on consider arguments that the contested measure breached Article 15(2) CFR, which also grants a right to free movement for workers. Addressing this point, the ECJ held that if the contested rule 'complies with Article 45 TFEU … it also complies with Article 15(2) of the Charter.'[122] While Article 52(2) CFR was not relied upon expressly to justify this conclusion, the ECJ cited its earlier case of *Gardella* in which it held that:

> As regards Article 15(2) of the Charter, it must be borne in mind that Article 52(2) thereof, which provides that rights recognised by the Charter for which provision is made in the treaties are to be exercised under the conditions and within the limits defined therein. In that vein, Article 15(2) of the Charter reiterates inter alia the free movement of workers guaranteed by Article 45 TFEU, as confirmed by the explanations relating to that provision.[123]

Thus, if Article 21(2) CFR was not expressly 'without prejudice' to more specific provisions in the Treaties, Article 52(2) CFR essentially precludes Article 21(2) CFR from applying independently.

3.5. Evaluation

In sum, where Charter rights overlap with Treaty provisions, the ECJ's interpretation of Article 52(2) CFR prevents those rights from having what Spaventa terms 'an autonomous life'.[124] The ECJ's case law suggests that Article 21(2) CFR cannot apply

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120 *Commission v Netherlands* (n 117), para. 87ff.
121 See also *Alimanovic* (n 117), paras 57-58; *García-Nieto* (n 117), paras 40-51; *Petruhhin* (n 117), para. 50; *Pisciotti* (n 117), para. 56.
122 Case C-284/15 *ONEm and M* EU:C:2016:220, para. 34.
123 Case C-233/12 *Gardella* EU:C:2013:449, para. 39. See also Case C-444/15 *Associazione Italia Nostra Onlus* EU:C:2016:978, paras 62-63
124 E Spaventa, 'Freedom of Movement and of Residence' in S Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 1161–1176, para. 45.34.

independently and that the replication of Article 18 TFEU in the Charter has little impact. Despite the potential for Article 21(2) CFR to add to the existing protection under the Treaty framework, as outlined above, the ECJ's interpretation of Article 52(2) CFR means that Article 21(2) CFR does not – and cannot – add to the pre-Charter legal framework.

One can recall here the tension between competing constitutional values and how different approaches to norm inter-relationship might alternately prioritise different constitutional principles, as discussed in Chapter 2. That tension manifests here. If the ECJ relied on Article 21(2) CFR as an additional check on legality (so that rules justified under the free movement provisions or Article 18 TFEU still had to satisfy Article 52(1) CFR), this would enhance protection from discrimination while increasing uncertainty over the compatibility of certain measures with Union law. The ECJ's approach in the cases outlined above, i.e. interpreting Article 21(2) CFR as identical to Article 18 TFEU, thus prioritises the aim of legal certainty over the competing constitutional principle of fundamental rights protection. As Lenaerts and de Smijter argue, 'from a standpoint of coherence of legal rules and thus of legal certainty it is to be applauded that the conditions of exercise of rights stated in the Charter are the same as those applying to the equivalent rights contained in the EC or EU Treaty.'[125]

However, it is submitted that the ECJ's approach perhaps goes too far in one direction and overly prioritises legal certainty over competing considerations. Arguably, a better balance might be to accept that Article 21(2) CFR cannot apply *independently*, but to recognise that the entry into force of the Charter – and the inclusion of an overlapping prohibition on nationality discrimination in a human rights document – should prompt a re-evaluation of the ECJ's existing interpretation of Article 18 TFEU. For example, the ECJ might at least examine whether its interpretation of Article 18 TFEU as applying only to Union citizens is compatible with the post-Charter status of the prohibition on discrimination as a fundamental right. By overlooking the inclusion of the prohibition on nationality discrimination in the Charter, the ECJ ignores the qualitative shift in the nature of Article 18 TFEU further away from its market origins,

[125] Lenaerts and de Smijter (n 102) 282.

including what this might mean for the ECJ's long-standing interpretation of that right. Such a reading would be compatible with Article 52(2) CFR, which only refers to the need for Charter rights corresponding with Treaty rights to 'be exercised under the conditions and within the limits defined by those Treaties.'

In fact, the ECJ follows the proposed approach in *Delvigne,* which concerned the right to vote in elections to the European Parliament. Following his conviction for a serious crime, French law permanently removed Mr Delvigne from the electoral register.[126] Mr Delvigne challenged the compatibility of the relevant French law with Article 39(2) CFR, according to which 'members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot'. This Charter provision replicates – almost exactly[127] – Article 14(3) TEU, which pre-existed the drafting of the Charter. The reasoning in *Delvigne* evidences a qualitative shift from pre-Charter case law on the right to vote in European Parliament elections. In the 2006 case of *Eman and Sevinger*, for example, the ECJ referred to how 'the definition of the persons entitled to vote and to stand for election falls within the competence of each Member State in compliance with Community law.'[128] In contrast, the ECJ in *Delvigne* expressly notes that Article 39(2) CFR 'constitutes the expression in the Charter of the right of Union citizens to vote in elections to the European Parliament'.[129] Van Eijken and van Rossem note how the ECJ's decision in *Delvigne* suggests that 'Union citizens have the right, *qualitate qua,* to vote in elections to the European Parliament … [and] departs from its earlier case law on electoral rights, in which it stressed that Union citizens … could not claim such an unequivocal right to vote.'[130] The replication of a provision already found in the Treaties in the Charter leads the ECJ in *Delvigne* to alter its previous interpretation.

4. CONCLUSION

This Chapter assessed how the ECJ resolves overlaps between primary norms in practice. The conclusions differ as to: first, the inter-relationship different between

126 Case C-650/13 *Delvigne* EU:C:2015:648, para. 15
127 Article 14(3) TEU additionally specifies the term of the European Parliament.
128 Case C-300/04 *Eman and Sevinger* EU:C:2006:545, para. 45.
129 *Delvigne* (n 126), para. 44
130 H van Eijken and JW van Rossem, 'Prisoner Disenfranchisement and the Right to Vote in Elections to the European Parliament: Universal Suffrage Key to Unlocking Political Citizenship?' (2016) 12(1) *EuConst* 114, 123.

Article 18 TFEU and the free movement rules; and, second, the relationship between Article 21(2) CFR and overlapping Treaty provisions.

In relation to the inter-relationship between Article 18 TFEU and overlapping free movement rules, Section 2 establishes the significance of this issue. Divergences emerge between the overlapping norms discussed, which means the ECJ's approach might alter the rights and obligations of parties to a dispute. An extensive analysis of ECJ case law shows how the ECJ almost always respects the 'without prejudice' clause in Article 18 TFEU that essentially codifies the *lex specialis* rule. In the event of a conflict, the 'without prejudice' clause precludes the application of the containing norm i.e. Article 18 TFEU. The 'without prejudice' clause does not necessarily prevent Article 18 TFEU from offering additional rights; however, this is only in those situations where the discriminatory rules are not precluded or otherwise justified under the free movement rules. This can be ambiguous at the boundaries of the free movement rules, especially when a specific situation is excluded from or otherwise falls outside the scope of the free movement rules as in *Neukirchinger* and *Ferlini*. Overall, however, the ECJ does not interpret the 'without prejudice' clause as preventing the application of Article 18 TFEU in situations not explicitly regulated by the Treaty freedoms.

In one sense it might have seemed quite banal to examine the inter-relationship between Article 18 TFEU and the free movement provisions. However, the value in doing so links to the point that there has actually been very little consideration of the principles and legal tools that govern the inter-relationship between norms in EU law. Furthermore, as analysis of the *Phil Collins* case law shows, the ECJ does sometimes depart from the 'without prejudice' clause thereby calling the residual nature of Article 18 TFEU into doubt. Greater clarity over the application of such clauses is thus not unnecessary. Furthermore, what the above analysis shows is that the 'without prejudice' clause works well in practice. It offers predictability over the inter-relationship between norms and ensures that the more detailed and more efficacious norm will apply, in line with the *lex specialis* principle.

On the inter-relationship between Article 21(2) CFR overlapping Treaty provisions, Section 3 offers a detailed analysis of how Article 52(2) CFR operates when there is an

overlapping Treaty provision. Despite the potential added value of Article 21(2) CFR, the ECJ's interpretation of Article 52(2) CFR prevents that provision from playing any independent role. Where a Charter right overlaps with an equivalent Treaty right, this seriously limits the potential added-value of the Charter and makes the inclusion of a Treaty right in the Charter of Fundamental Rights essentially meaningless. It is argued that the ECJ's approach does not sufficiently recognise the implications of the Charter. From the perspective of legal certainty, Article 21(2) CFR should not apply residually (in the same way Article 18 TFEU relates to the free movement rules). However, this should not prevent an assessment of whether the ECJ's pre-Charter interpretation of Article 18 TFEU befits the nature of that Treaty provision as a fundamental right.

Overall, as a technique for resolving questions of norm inter-relationship, this Chapter shows that the ECJ tends to follow priority clauses consistently. This fits with the argument made in Chapter 2 that priority clauses, such as the 'without prejudice' clause, can provide a workable approach that can guide the ECJ. This is, at least, the conclusion reached in relation to overlapping primary norms and 'without prejudice' clauses. Chapter 5 now turns to assess how the ECJ approaches overlaps between norms of the same status where there is a 'shall not affect' clause and where there is no priority clause.

Chapter Five

Interactions between Overlapping Secondary Law Norms

1. INTRODUCTION

This Chapter focuses on another set of overlaps between norms of the same status: overlaps between different provisions of secondary Union law prohibiting discrimination on grounds of nationality. Chapter 2 discussed the relevance of priority clauses and the principles of *lex specialis* and *lex posterior* – prioritising whichever norm is more specific or later in time – for determining overlaps between norms of the same rank. This Chapter assesses ECJ practice against this baseline and concludes that the ECJ should follow interpretative guidance offered by priority clauses (reaffirming the conclusion reached in Chapter 4) and the principle of *lex specialis*.

As a testing ground, this Chapter focuses on overlaps between secondary norms prohibiting nationality discrimination; specifically, the Chapter examines secondary norms granting equal access to certain social benefits. Attention focuses on the overlap between Regulations 883/2004[1] and 492/2011[2] (replacing Regulations 1612/68[3] and 1408/71[4] respectively) and Directive 2004/38.[5] While there is a priority clause mediating the inter-relationship between the Regulations, no express clause determines the inter-relationship between the Regulations and Directive 2004/38. It is argued that the principle of *lex specialis* offers the most logical guidance to the ECJ in this context, since

[1] Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166/1.
[2] Regulation 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141/1.
[3] Regulation 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ Spec Ed (II) 475.
[4] Regulation 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ Spec Ed (II) 416.
[5] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77.

the different amendments to the Regulations make it difficult to identify the relevant date for effective application of *lex posterior*.

Where a priority clause exists, this Chapter shows that the ECJ almost always follows such a clause. The overall conclusion reached is that respecting priority clauses works well and reaches a balance between competing concerns. In the absence of a priority clause, though, the ECJ does not follow a consistent approach. Despite the potential relevance of the *lex specialis* principle in the case study adopted, ECJ practice rarely concurs with this approach. However, where ECJ practice coheres with reliance on the *lex specialis* principle, this Chapter shows the attendant benefits from the perspective of legal certainty, institutional balance and fundamental rights protection. Overall, where there is no priority clause, it is argued that the ECJ ought to rely upon the principle of *lex specialis* more consistently than it does and should clearly articulate this.

2. CASE STUDY: EQUAL ACCESS TO SOCIAL BENEFITS

To test the ECJ's use of priority clauses and priority principles when determining the inter-relationship between overlapping secondary norms, this Chapter concentrates on EU rules prohibiting nationality discrimination in connection with eligibility for social security and social assistance:[6] Regulations 883/2004 and 492/2011 (replacing Regulations 1408/71 and 1612/68 respectively) and Directive 2004/38. While these measures do not usually coincide,[7] each grants (some) EU citizens and their family members the right to equal treatment as regards certain social benefits. Put briefly, Regulation 883/2004 grants 'nationals of a Member State … who are or have been subject to the legislation of one or more Member States'[8] equal treatment in accessing social security benefits; Regulation 492/2011 grants migrant workers 'the same social and tax advantages as national workers';[9] and Directive 2004/38 grants the right to equal

[6] For a more wide-ranging survey of EU laws prohibiting nationality discrimination, see Chapter 1.
[7] These measures are, in fact, largely distinct: Regulation 492/2011 aims to secure free movement of workers and covers access to employment and vocational training and employment rights; Regulation 883/2004 coordinates social security entitlement across the EU and includes rules on entitlement to and aggregation of benefits as well as which Member State is responsible; and Directive 2004/38 sets out the conditions and administrative formalities for obtaining and retaining residence rights in a host Member State.
[8] Article 2(1).
[9] Article 7(2).

treatment 'within the scope of the Treaty'[10] to lawfully resident Union citizens (with certain exceptions). This Section highlights the similarities, but also the divergences, between these overlapping measures.

2.1. Material Scope

Each measure grants equal access to different – but overlapping – categories of social benefits. Regulation 883/2004 applies to social security[11] and special non-contributory benefits,[12] but explicitly does not cover social assistance.[13] Regulation 492/2011 applies to the broader concept of social advantages,[14] namely all benefits which:

> … whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and whose extension to workers who are nationals of other Member States therefore seems likely to facilitate the mobility of such workers within the Community.[15]

The wide definition of social advantages means that certain benefits fall within the material scope of both Regulations.[16] An overlap emerges in relation to social security[17] and special non-contributory benefits[18] under Regulation 883/2004, which are also social advantages. However, the concept of social advantages also encompasses benefits falling outside the scope of Regulation 883/2004 such as study finance[19] and social assistance benefits.[20] Directive 2004/38 added to these existing overlaps. The Directive

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[10] Article 24(1).
[11] Article 3 of Regulation 883/2004 exhaustively lists the benefits classed as 'social security' as benefits relating to sickness, maternity and paternity, invalidity, old-age, survivors', occupational accidents and diseases, death, unemployment, pre-retirement and family. To qualify as 'social security', a benefit must cover one of these risks and be granted as of right to recipients in a legally defined position, see e.g. Case 1/72 *Frilli* EU:C:1972:56, para. 14; Case 249/83 *Hoeckx* EU:C:1985:139, para. 12.
[12] Special non-contributory benefits have the characteristics of both social security and social assistance. They were introduced by Regulation 1247/92 of 30 April 1992 amending Regulation 1408/71 [1992] OJ L 136/1.
[13] Article 3(5). A benefit will be social assistance 'where it prescribes need as an essential criterion for its application and does not stipulate any re-quirement as to periods of employment, membership, or contribution', see *Frilli* (n 11), para. 14; Case 187/73 *Callemeyn* EU:C:1974:57, para. 7.
[14] Article 7(2). See also Regulation 1612/68, Article 7(2).
[15] Case 207/78 *Even* EU:C:1979:144, para. 22; *Hoeckx* (n 11), para. 20; Case 122/84 *Scrivner* EU:C:1985:145, para. 24.
[16] Case C-111/91 *Commission v Luxembourg (childbirth and maternity allowances)* EU:C:1993:92, paras 22, 32; Case C-85/96 *Martínez Sala* EU:C:1998:217, paras 24, 26-27.
[17] *Commission v Luxembourg (childbirth and maternity allowances)* (n 16), paras 22, 32; Case C-310/91 *Schmid* EU:C:1993:221, para. 17; *Martínez Sala* (n 16), paras 24, 26-27.
[18] Case C-287/05 *Hendrix* EU:C:2007:494, paras 38, 49.
[19] Case 39/86 *Lair* EU:C:1988:322, para. 24; Case C-3/90 *Bernini* EU:C:1992:89, paras 23, 25; Case C-337/97 *Meeusen* EU:C:1999:284, para. 19.
[20] Case 94/84 *Deak* EU:C:1985:264, paras 15, 22; *Hoeckx* (n 11), para. 22; *Scrivner* (n 15), para. 26.

covers all benefits falling within the scope of the Treaty,[21] and so overlaps with social security and special non-contributory benefits under Regulation 883/2004 and social advantages under Regulation 492/2011.[22]

The adoption of Directive 2004/38, which permits Member States to restrict eligibility to certain benefits covered by both the Directive and the Regulations, led to additional complications. According to Article 24(2) of the Directive, a 'host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or [to jobseekers] nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid … to persons other than workers, self-employed persons, persons who retain such status and members of their families.' A potential conflict arises here since social assistance under the Directive does not cover only those benefits excluded from Regulation 883/2004[23] but also special non-contributory benefits[24] and social advantages. Similarly, maintenance aid for studies is a social advantage.[25] Making the inter-relationship between norms crucial here, Directive 2004/38 allows Member States to restrict access to certain benefits, while – in relation to the same benefits – Regulations 883/2004 and 492/2011 do not permit derogations from equal treatment.[26]

A social benefit may, therefore, fall within the material scope of one or more of the measures considered here. In most instances, the different equal treatment rights accumulate. What creates complications are the permissible derogations from equal treatment in Directive 2004/38; the Directive conflicts with the overlapping Regulations by allowing Member States to limit equal treatment when the overlapping Regulations do not. Which measure the ECJ prioritises can thus alter the applicant's entitlement to certain benefits.

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[21] Article 24(1).
[22] *Martínez Sala* (n 16), paras 24, 26, 57.
[23] Case C-140/12 *Brey* EU:C:2013:565, para. 61.
[24] *Brey* (n 23), paras 33-36, 62.
[25] Case C-46/12 *LN* EU:C:2013:97, paras 34, 50. Maintenance aid is not a social security or special non-contributory benefit and so falls outside the material scope of Regulation 883/2004, see Case C-33/99 *Fahmi and Esmoris Cerdeiro-Pinedo Amado* EU:C:2001:176, para. 35.
[26] Regulation 492/2011 applies only to workers and their family members it is unlikely that a conflict emerges between Regulation 492/2011 and Directive 2004/38 regarding eligibility for social assistance.

2.2. Personal Scope

In terms of *who* can claim equal treatment and *with whom*, each measure applies to a slightly different subset of Union citizens and grants equal treatment with nationals of either their home or host Member State.

One overlap is quite simple: all of the measures apply to Union citizens *working* in a host Member State. Regulation 492/2011 grants the right to equal treatment to *workers*. Regulation 883/2004 applies to 'nationals of a Member State … who are or have been subject to the legislation of one or more Member States', clearly covering workers.[27] Directive 2004/38 applies to 'all Union citizens residing on the basis of this Directive',[28] which includes Union citizens working and residing in a host Member State.[29] A Union citizen working and residing in a host Member State may thus be able to invoke all three measures.

Generally, a Union citizen will be entitled to equal treatment with nationals of the Member State of employment.[30] However, the different rules applying to frontier workers (i.e. Unions citizen working in one Member State while residing in another) can lead to conflicts between the measures. Under Regulation 492/2011, a frontier worker is always entitled to equal treatment with nationals of the Member State of past and present employment.[31] Regulation 883/2004 usually adopts this approach; in some circumstances, though, the Regulation only permits frontier workers to claim equal treatment in the Member State of *residence*.[32] Adding additional complexities, the personal scope of Directive 2004/38 is limited to 'Union citizens who move to or reside in a

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[27] Article 2(1).
[28] Article 24(1).
[29] Article 7(1). Worker status can be retained in the event of: (a) temporary inability to work due to an illness or accident; (b) involuntary unemployment after being in employment for over a year; (c) involuntary unemployment after less than a year of working; (d) study or vocational training.
[30] Regulation 883/2004, Article 11(3)(a) 'a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State'; Directive 2004/38, Article 24(1), a Union citizen 'residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State'; Regulation 492/2011, Article 7, 'A worker who is a national of a Member State…in the territory of another Member State…shall enjoy the same social and tax advantages as national workers'.
[31] Case C-57/96 *Meints* EU:C:1997:564, para. 43ff; *Meeusen* (n 19), paras 18-25; Case C-212/05 *Hartmann* EU:C:2007:437, para. 38.
[32] Under Regulation 883/2004, a frontier worker can only claim unemployment benefits and special non-contributory benefits in the Member State of residence: Articles 63, 65(2), 70(4). See also, Regulation 1408/71, Articles 71(1)(a)(ii), 10a.

Member State other than that of which they are a national'.[33] Thus Article 24 of Directive 2004/38 grants frontier workers residing in a host Member State the right equal treatment with nationals of the Member State of residence, but does not cover frontier workers working in a host Member State but residing in their home Member State. The measures point in different directions here.

All three measures also extend the right to equal treatment to family members of Union citizens. Family members of Union citizens falling within the personal scope of Regulation 883/2004 and Directive 2004/38 are able to invoke the right to non-discrimination,[34] whereas Article 7(2) of Regulation 492/2011 only indirectly benefits family members of a worker.[35]

Regulation 883/2004 and Directive 2004/38, unlike Regulation 492/2011, also apply to the self-employed and to some economically inactive persons. In relation to the self-employed, Regulation 883/2004 replaced Regulation 1408/71, which applied – after amendment[36] – to both employed and self-employed persons. Directive 2004/38 also grants a right of residence to Union citizens who are self-employed in a host Member State.[37] As regards economically inactive Union citizens, Regulation 883/2004 expands the personal scope of its predecessor (Regulation 1408/71) by adding 'a new category of non-active persons'[38] who have been subject to the social security systems of one or more Member States. The personal scope of Directive 2004/38 is not as broad, extending to economically inactive Union citizens in three situations: (1) during their first three months of residence;[39] (2) if they meet certain conditions regarding financial resources and sickness insurance;[40] or (3) if they 'provide evidence that they are

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33 Article 3.
34 Regulation 883/2004, Article 2. Directive 2004/38, Articles 6(2), 7(1)(d). Under the Directive, family members retain the right of residence – and thereby also the right to equal treatment – after the death or departure of the Union citizen and, sometimes, in the event of a divorce: Articles 12, 13.
35 Case 32/75 *Cristini* EU:C:1975:120, para. 13; Case 63/76 *Inzirillo* EU:C:1976:192, para. 21; Case 261/83 *Castelli* EU:C:1984:280, paras 10-12; *Deak* (n 20), paras 23-24.
36 Council Regulation 1390/81 extending to self-employed persons and members of their families Regulation 1408/71 [1981] OJ L 143/1.
37 Directive 2004/38, Article 7(1).
38 Regulation 883/2004, Preamble, Recital 42.
39 Directive 2004/38, Article 6.
40 Economically inactive Union citizens must prove they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State and have comprehensive sickness insurance cover (Article 7(1)(b)). Students must have comprehensive sickness insurance and be able to 'assure' the national authority that they have sufficient resources for

continuing to seek employment and that they have a genuine chance of being engaged.'[41] The main point of contrast here is the additional requirements imposed by Directive 2004/38 such as self-sufficiency and health insurance; Regulation 883/2004 only requires previous coverage by the social security system of a Member State.

A point requiring further clarification is the concept of 'residence' and its differing role under each measure. 'Lawful residence' (or the lack thereof) determines the personal scope of Directive 2004/38. Union citizens (and their family members) will be lawfully resident under the Directive if they fall within the situations set out above, i.e. Union citizens residing in a host Member State who are working, self-employed, seeking work, in the first three months of residence or who otherwise meet certain conditions relating to resources and health insurance. Lawful residence preconditions the right of Union citizens or their family members to claim equal treatment: Article 24(1) prohibits discrimination against 'Union citizens residing on the basis of [Directive 2004/38]'.

Conversely, Regulation 883/2004 employs a concept of residence to *allocate responsibility* for administering benefits and prevent the concurrent application of national legislation or gaps in protection. Article 11 of Regulation 883/2004 sets out the Member State responsible for paying social security benefits, while Article 70 sets out rules concerning which Member State is responsible for paying special non-contributory benefits. Under Article 11, the Member State where economic activity is carried out (which may differ from the Member State of residence) usually decides entitlement to social security benefits.[42] However, where a Union citizen is economically inactive, Article 11(3)(e) reallocates responsibility for social security provision to the Member State of *residence*. The Member State in which a Union citizen resides is, however, always responsible for special non-contributory benefits.[43] Residence here is a term of art and differs from the notion of 'lawful residence' under Directive 2004/38.

Under Regulation 883/2004, determining the Member State of residence is a factual test assessing where 'the persons concerned habitually reside and where the habitual centre

themselves and their family members (Article 7(1)(c)).
[41] Article 14(4)(b).
[42] Regulation 883/2004, Article 11(3)(a).
[43] Regulation 883/2004, Article 65, 70(4).

of their interests is to be found'.[44] As a consequence, a person may not meet the conditions of residence under both measures:[45] a person may be lawfully resident under Directive 2004/38 but not under Regulation 883/2004 and *vice versa*. For example, a Union citizen in a host Member State for less than three months will be lawfully resident under Directive 2004/38 but may not satisfy the criterion of habitual residence under Regulation 883/2004. A Union citizen staying temporarily in one Member State may claim equal access to social benefits (so long as they do not amount to social assistance) under Directive 2004/38. If that Union citizen does not meet the criteria for residence in that Member State under Regulation 883/2004, they could potentially also claim social benefits in the Member State where they habitually reside. Conversely, under Regulation 883/2004 an economically inactive Union citizen in a host Member State may be *resident* there if it is the centre of their interests and may be able to claim equal treatment in that Member State if they fall within the personal scope of Regulation 883/2004 (i.e. they have been subject to the social security system of one or more Member States). However, that Union citizen may not be lawfully resident under Directive 2004/38 (and so able to rely on the right to equal treatment under the Directive) unless they meet the additional criteria specified therein.

In sum, the measures outlined above create a complex legislative framework of entitlement: each measure covers slightly different benefits with distinct conditions for equal treatment. The personal scope of Directive 2004/38 is narrower than Regulation 883/2004,[46] while Directive 2004/38 permits certain derogations from equal treatment. The important question is, then, '[h]ow will the Court decide on which expression of the principle of non-discrimination it will rely when determining a Union citizen's right to equal treatment?'[47]

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[44] In determining the centre of a person's interests 'account should be taken in particular of the employed person's family situation; the reasons which have led him to move; the length and continuity of his residence; the fact (where this is the case) that he is in stable employment; and his intention as it appears from all the circumstances', see Case C-90/97 *Swaddling* EU:C:1999:96, para. 29.
[45] See H Verschueren, 'Free Movement of Persons in the European Union and Social Rights: An Area of Conflicting Secondary Law Instruments?' (2011) 12(2) *ERA Forum* 287, 295.
[46] See Section 5.
[47] S O'Leary, 'Free Movement of Persons and Services' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 499-545, 518.

3. PRIORITY CLAUSES AND PRIORITY PRINCIPLES

The divergences between the overlapping norms considered by this Chapter make their inter-relationship all the more important. A priority clause mediates the relationship between Regulation 492/2011 and Regulation 883/2004. No express clause determines the inter-relationship between Directive 2004/38 and either overlapping Regulation, though, thereby engaging the principles of *lex specialis* and *lex posterior*.

3.1. The 'Shall Not Affect' Clause

The Union legislature included a priority clause in Regulation 492/2011, which subjugates that measure to Regulation 883/2004. According to Article 36(2) of Regulation 492/2011, that Regulation 'shall not affect measures taken in accordance with Article 48 [TFEU]'.[48] This includes Regulation 883/2004, the legal basis being (what is now) Article 48 TFEU.[49]

Chapter 2 argued that the expected meaning of 'shall not affect' clauses is that they prioritise one norm over the norm of which they are part.[50] Where a conflict arises between Regulation 492/2011 and Regulation 883/2004, the expectation is that the ECJ will prioritise Regulation 883/2004. For example, the Regulations sometimes differ in their treatment of frontier workers. Under Regulation 492/2011, frontier workers can claim social advantages on equal terms with nationals of the Member State of past and present employment;[51] whereas Regulation 883/2004 requires that frontier workers claim unemployment benefits and other special non-contributory benefits in the Member State of *residence*.[52] In this context, the expectation is that the 'shall not affect' clause will grant precedence to the solution under Regulation 883/2004; this would

[48] Regulation 1612/68 included an analogous priority clause, which subjugated that measure to Regulation 1408/71 and, later, Regulation 883/2004: Regulation 1612/68, Article 42(2).
[49] Regulation 883/2004 is also based upon Articles 21(2) and 352 TFEU.
[50] The drafting history of Regulations 1612/68 and 492/2011 provides no further guidance on the intended meaning of the 'shall not affect' clause; neither the Commission's original proposal nor the resolutions of the Economic and Social Committee and the European Parliament make any reference to the 'shall not affect' clause, see Commission, 'Proposition d'un règlement du Conseil relatif à la libre circulation des travailleurs à l'intérieur de la Communauté' [1967] OJ 145/11; Economic and Social Committee, 'Consultation du Comité économique et social au sujet d'une proposition de règlement du Conseil relatif à la libre circulation des travailleurs à l'intérieur de la Communauté' [1967] OJ 298/9; European Parliament, 'Procès-verbal de la séance du mardi 17 octobre 1967' [1967] OJ 268/7, 9.
[51] See n 31.
[52] Regulation 883/2004, Articles 63, 65(2), 70(4).

preclude any claims to equal treatment in the Member State of residence. Agreeing with Verschueren, where the Regulations conflict:

> … the provisions of Regulation 1408/71 and Regulation 883/2004, as *lex specialis*, take precedence over the provisions of Regulation 1612/68. This means that if Regulation 1408/71 or Regulation 883/2004 is applicable to a particular situation, the solution ensuing from the application of the provisions of Regulation 1408/71 or Regulation 883/2004 would take precedence over any solution that might ensue from applying the provisions of Regulation 1612/68.[53]

As Verschueren points out, the 'shall not affect' clause recognises the *lex specialis* nature of Regulation 883/2004 in comparison to Regulation 492/2011. The former Regulation provides detailed rules regarding the coordination of Member State social security schemes, which Member State is responsible for paying benefits as well as the entitlement of Union citizens to certain benefits. It would counter the aims behind that Regulation if the application of Regulation 492/2011 could displace the detailed coordinating rules.

The same ambiguity discussed in Chapter 4 over what it means for one norm to 'affect' or 'prejudice' another arises again here. The broad concept of a social advantage means that Regulation 492/2011 often grants Union citizens equal access to benefits other than those covered by Regulation 883/2004. For example, Regulation 492/2011 covers benefits amounting to social assistance whereas Regulation 883/2004 expressly does not apply to social assistance.[54] The import of the 'shall not affect' clause becomes somewhat opaque here. Would it 'affect' the exclusion of certain benefits from Regulation 883/2004 if a Union citizen relies on Regulation 492/2011 to claim equal access to social assistance benefits? If one reads Regulation 883/2004 as defining exhaustively what benefits migrant Union citizens can claim equal access to, allowing a Union citizen to rely on Regulation 492/2011 might be understood as contradicting – and potentially 'affecting' – the limits set out in that measure. The difficulty with this argument, as set out in Chapter 2 and again reiterated in Chapter 4, is that Regulation 883/2004 does not purport to exhaustively determine the extent of the prohibition on nationality discrimination. Furthermore, given that Regulation 883/2004 does not prohibit Union citizens from claiming social assistance in a host Member State (but just

[53] Verschueren, 'Free Movement of Persons in the European Union and Social Rights' (n 45) 292. See also F Pennings, *European Social Security Law* (6th edn, Intersentia 2015) 138.
[54] Article 3.

does not regulate entitlement to social assistance) one can understand the Regulations as complementary here. Indeed, Advocate General Cosmas argues that the notion of 'social advantage', when first included in Regulation 1612/68, was intended to operate residually and cover benefits not classed as social security.[55]

3.2. The Principles of *Lex Specialis* and *Lex Posterior*

The EU legislature did not provide 'any guidance as to the hierarchy or priority between [Directive 2004/38 and overlapping measures] … nor … principles for solving possible conflicts'.[56] The ECJ is responsible for determining the relations between overlapping norms. As set out in Chapter 2, existing principles of norm inter-relationship should offer the ECJ guidance here. Where norms of the same hierarchical status overlap, this engages two different priority principles; first, the principle of *lex specialis* that prioritises the more specific norm and, secondly, the principle of *lex posterior* that prioritises the more recent norm.

No hierarchy exists between the principles of *lex specialis* and *lex posterior*. Instead, judges must decide 'contextually as to whether the degree of speciality or the time of emergence of the norm is more important'.[57] In the context of the case study considered here, the date of adoption appears less important. The Union legislature adopted Regulation 883/2004 and Directive 2004/38 on the same date meaning the principle cannot prioritise between overlapping norms here. In the context of overlaps between Regulation 492/2011 and Directive 2004/38 and Regulation 1612/68 and Directive 2004/38, the principle of *lex posterior* does not reach a logical conclusion. The difficulty here is that Regulation 492/2011 codified Regulation 1612/68; applying the principle of *lex posterior* would mean the subjugation of the rules on equal treatment of workers to Article 24 of Directive 2004/38 until the codification of those rules in 2011 at which point the relationship of priority would reverse. As Regulation 492/2011 did not change the rules on equal treatment the principle of *lex posterior* seems almost arbitrary here.

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[55] Case C-160/96 *Molenaar* EU:C:1997:599, Opinion of AG Cosmas, paras 99-100.
[56] M Coucheir and others, 'The relationship and interaction between the coordination Regulations and Directive 2004/38/EC' (trESS Think Tank Report, Project DG EMPL/E/3, 2008) 3.
[57] ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Conclusions' (18 July 2006) UN Doc A/CN.4/L.702 ('Fragmentation Report Conclusions'), para. 9. See also D Pulkowski, *The Law and Politics of International Regime Conflict* (OUP 2014) 322-23.

Can the principle of *lex specialis* offer more workable interpretative guidance to the ECJ when faced with overlaps between Directive 2004/38 and the Regulations? Under the principle of *lex specialis,* the more specific norm precludes the application of the more general norm, although it does not invalidate the *lex generalis*.[58] The difficulty with applying the principle is the identification of the *lex specialis*. In general, as noted in Chapter 2, the more specific norm will: (1) set out how a general rule applies in particular circumstances; or (2) provide an exception to a more general rule.[59] To determine which norm is the *lex specialis*, a contextual examination of the different norms will often be necessary. According to the International Law Commission, identifying the *lex specialis*:

> … is entirely dependent on the normative considerations for which it provides articulation: sensitivity to context, capacity to reflect State will, concreteness, clarity, definiteness. Its functioning cannot be assessed independently of the role of considerations of the latter type in specific context of legal reasoning. How does a particular agreement relate to the general law around it? Does it implement or support the latter, or does it perhaps deviate from it? Is the deviation tolerable or not? No general, context-independent answers can be given to such questions. In this sense, the *lex specialis* maxim cannot be meaningfully codified.[60]

What follows tries to apply these criteria to the overlaps between Directive 2004/38 and the Regulations.

In relation to Regulation 492/2011 and Directive 2004/38, their largely distinct character (aside from overlapping equality provisions) makes conceiving one measure as a specific application of or derogation from the other difficult. Purely from the perspective of specificity, the personal and material scope of Regulation 492/2011 are narrower than that of Directive 2004/38. The Regulation applies only to workers and to social advantages, whereas Directive 2004/38 applies to all Union citizens and their family members residing on the basis of that Directive and to all benefits falling within the scope of the Treaty. When looked at more contextually, Directive 2004/38 sets out

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[58] ILC, 'Fragmentation Report Conclusions' (n 57) para. 9.
[59] ILC, 'Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*' (13 April 2006) UN Doc A/CN.4/L.682 ('Fragmentation Report'), para. 88; A Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis'* (2005) 74(1) *NJIL* 27, 45.
[60] ILC, 'Fragmentation Report' (n 59) para. 119

the basic rights of all Union citizens and their family members residing in a host Member State while the Regulation establishes a specific regime solely for workers. In this sense it is possible to understand Regulation 492/2011 as the *lex specialis* since it specifically grants additional rights to migrant Union citizens working in a host Member State on top of the basis established by Directive 2004/38.

Scholars disagree over the relationship between Directive 2004/38 and Regulation 883/2004. While Regulation 883/2004 has been referred to as a *lex specialis* in relation to the Directive,[61] Lhernould and others recently argued against this on the grounds that:

> Both legal instruments … are different in their legal character …The Regulation creates immediate and direct individual rights; the Directive, however, is addressed to the Member States and makes them create domestic legislation in line with the EU Directive's standard. Therefore, both instruments have a different legal impact: the Regulation creates rights or duties, whereas the Directive empowers the Member States to take legislative action in the future.[62]

The form of the legal act is not necessarily fatal to the application of the principle of *lex specialis*.[63] What is more, although directives are not 'directly applicable' like Regulations, the ECJ confirms their capacity for vertical direct effect. Looking to the context of the measures, Regulation 883/2004 seems more specialised. Directive 2004/38 focuses on the position of all EU citizens and their family members to move to and reside in a host Member State, while Regulation 883/2004 coordinates the social security entitlement for Union citizens exercising that right. In relation to equal access to social benefits, then, one would expect Regulation 883/2004 to be treated as *lex specialis*.

Treating the Regulations as *lex specialis* in relation to Directive 2004/38 should mean that, where a situation falls within the material and the personal scope of one of the Regulations, the outcome determined by the Regulation prevails. The *lex generalis*

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[61] Coucheir and others (n 56) 29; H Verschueren, 'The EU Social Security Co-Ordination System: A Close Interplay between the EU legislature and judiciary' in P Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (CUP 2012) 177-204, 179.

[62] JP Lhernould and others, 'Assessment of the impact of amendments to the EU social security coordination rules to clarify its relationship with Directive 2004/38/EC as regards economically inactive persons' (FreSsco Analytical Report 2015) 14.

[63] On the application of the principle of *lex specialis* between different legislative acts, see Case T-123/99 *JT's Corporation v Commission* EU:T:2000:230, para. 50. On the use of the principle in overlaps between Treaty and custom, see ILC, 'Fragmentation Report' (n 59) para. 66.

remains in the background, however, and may still apply in situations falling outside of the personal or material scope of one of the Regulations.

3.3. Summary

The express clause in Regulation 492/2011 and basic principles of priority, suggest that: (1) Regulation 883/2004 takes precedence over both Regulation 492/2011 and Directive 2004/38; and, (2) Regulation 492/2011 takes precedence over Directive 2004/38 in relation to workers. Discussion now turns to assess whether the ECJ follows this approach in practice as well as the pros and cons of doing so.

4. ECJ PRACTICE CONSISTENT WITH THE 'SHALL NOT AFFECT' CLAUSE AND THE *LEX SPECIALIS* PRINCIPLE

4.1. Introduction

Extensive case law analysis identified a *prima facie* overlap between:[64] (1) Regulation 492/2011 and Regulation 883/2004 (or their predecessors) in eighty cases; (2) Regulation 883/2004 and Directive 2004/38 in seven cases; (3) Regulations 1612/68 and 492/2011 and Directive 2004/38 in two cases. This Section sets out those cases in which ECJ practice accords with the orthodox approach – even if the ECJ fails to articulate the relevant principles of interpretation clearly. The Section then offers a preliminary evaluation of this approach.

Most cases dealing with an overlap between two or more secondary norms fit with the approach set out in Section 3: the ECJ respects the 'shall not affect' clause (where applicable) and otherwise prioritises the more specific norm. Apparent divergences emerge in some cases, but on closer inspection the difference is more cosmetic than real and does not suggest the ECJ is applying a different principle of interpretation. These

[64] Case law was identified by searching the curia.eu database. Searches were carried out by specific legislative provision (i.e. Regulation 883/2004, Article 4; Regulation 492/2011, Article 7(2); Directive 2004/38, Article 24) and by the following keywords: 'social assistance', 'social security', 'social advantage', 'maintenance aid' 'non-discrimination', 'equal treatment'. A case involves an 'overlap' when it involves a claim for equal treatment to some form of social benefit that could prima facie fall within the scope of both Regulations. This discounts cases in which, after finding the situation fell outside the scope of Regulation 883/2004 or its predecessors, the ECJ then turned to consider Article 45 TFEU. Case law is up to date as of 26 July 2018.

cases are instead indicative of the failure of the ECJ to articulate clearly what is a fairly consistent approach to the inter-relationship between overlapping norms.

4.1.1 Following the Expected Approach Exactly

In seventy per cent of the cases involving an overlap *prima facie* between Regulations 883/2004 and 492/2011 (and their predecessors), ECJ practice is consistent with the application of the 'shall not affect' clause. The ECJ first analyses the situation under Regulation 883/2004. If the benefit is social security and the national measure constitutes discrimination, the ECJ will not then discuss Regulation 492/2011.[65] The ECJ will turn to consider whether the measure is in breach of Regulation 492/2011 *only if* the situation falls outside the personal or material scope of Regulation 883/2004.[66]

However, the ECJ rarely refers to the 'shall not affect' clause as part of its rationale for prioritising Regulation 883/2004. Only in one case – *Commission v France* – does the ECJ explicitly discuss the 'shall not affect' clause. After deciding that a benefit fell outside Regulation 1408/71, the ECJ held that turning to consider Regulation 1612/68 was 'consistent with [the 'shall not affect' clause]'.[67] The suggestion is that, otherwise, turning to Regulation 1612/68 would be contrary to the clause. One can draw a contrast here with the ECJ's approach to the inter-relationship between Article 18 TFEU and the free movement provisions discussed in Chapter 4. In the vast majority of cases, the ECJ explicitly refers to the priority clause in Article 18 TFEU as the reason that provision does not apply.

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[65] *Frilli* (n 11), para. 4ff; Case 39/74 *Costa* EU:C:1974:122, paras 11-13; Case 7/75 *Fracas* EU:C:1975:80, paras 17, 21; Case 237/78 *Toia* EU:C:1979:197, para. 19; Joined Cases 82 and 103/86 *Laborero* EU:C:1987:356, para. 28; Case 33/88 *Allué* EU:C:1989:222, para. 22; Case C-307/89 *Commission v France* EU:C:1991:245, para. 14; Case C-146/93 *McLachlan* EU:C:1994:282; Case C-308/93 *Cabanis-Issarte* EU:C:1996:169, para. 44; Case C-211/97 *Gómez Rivero* EU:C:1999:275, para. 26; Case C-124/99 *Borawitz* EU:C:2000:485, para. 35; Case C-43/99 *Leclere and Deaconescu* EU:C:2001:303, para. 31; Case C-286/03 *Hosse* EU:C:2006:125, para. 56; Case C-346/05 *Chateignier* EU:C:2006:711, para. 36; Case C-332/05 *Celozzi* EU:C:2007:35, para. 40; Case C-399/09 *Landtová* EU:C:2011:415, para. 41ff; Case C-523/13 *Lachar* EU:C:2014:2458, para. 28ff.

[66] *Even* (n 15), paras 15, 24; *Hoeckx* (n 11), paras, 14-15, 22-25; *Scrivner* (n 15), paras 21, 26; *Deak* (n 20), paras 16, 23-24; Case 256/86 *Frascogna* EU:C:1987:359, paras 17, 25; Case C-243/91 *Taghavi* EU:C:1992:306, paras 9, 11; *Schmid* (n 17), para. 12ff; Case C-278/94 *Commission v Belgium* EU:C:1996:321, para. 25; Case C-35/97 *Commission v France* EU:C:1998:431, para. 35ff; *Meints* (n 31), paras 42, 51; *Fahmi and Esmoris Cerdeiro-Pinedo Amado* (n 25), para. 36ff; Case C-138/02 *Collins* EU:C:2004:172, paras 52-53; Case C-386/02 *Baldinger* EU:C:2004:535, paras 18-19; *Hartmann* (n 31), paras 11, 15ff; Case C-213/05 *Geven* EU:C:2007:438, paras 8, 11ff.

[67] *Commission v France* (n 65) para. 44.

When faced with an overlap between one of the Regulations and Directive 2004/38, ECJ practice does not always cohere with the *lex specialis* principle. In the two cases involving a *prima facie* overlap between Regulation 492/2011 and Directive 2004/38, ECJ practice is consistent with treating the Regulation as a *lex specialis*.[68] In both cases the ECJ prioritises the result reached under Regulation 492/2011,[69] stressing in *Bragança Linares Verruga* that the restrictions relating to maintenance aid in Directive 2004/38 relate to 'a context other than that of equal treatment of national workers and migrant workers.'[70] When a case involves workers, the suggestion is that Regulation 492/2011 takes precedence over Directive 2004/38. The ECJ does not, however, refer explicitly to the principle of *lex specialis* or use the language of specificity in its judgment.

In only two of the seven cases involving a *prima facie* overlap between Regulation 883/2004 and Directive 2004/38 does ECJ practice accord with treating Regulation 883/2004 as *lex specialis*.[71] In those cases, the ECJ does not cite Directive 2004/38 and so it is unclear why the ECJ prioritises Regulation 883/2004. It may be because there is some economic activity on the part of the Union citizen[72] (preventing Member States from relying on the derogation under Directive 2004/38) or the ECJ may view the provisions of Regulation 883/2004 as more specialised.[73] The ECJ does not, however, articulate the principle of interpretation upon which it is relying. The remaining case law concerning the overlap between Regulation 883/2004 and Directive 2000/38, which does not cohere with the *lex specialis* principle, will be discussed in Section 5 below.

4.1.2 Apparent Inconsistency: Still Considering the Lex Generalis

In less than five per cent of cases involving an overlap between Regulations 883/2004 and 492/2011 (and their predecessors), after finding a national measure discriminatory under Regulation 883/2004, the ECJ still analyses Regulation 492/2011.[74] Strictly

[68] *LN* (n 25); Case C-238/15 *Bragança Linares Verruga* EU:C:2016:949.
[69] *LN* (n 25), paras 48-51; *Bragança Linares Verruga* (n 68).
[70] *Bragança Linares Verruga* (n 68), para. 66.
[71] Case C-507/06 *Klöppel* EU:C:2008:110; Case C-284/15 *ONEm and M* EU:C:2016:220.
[72] *Klöppel* (n 71), paras 8-10; *ONEm and M* (n 71), paras 11-12.
[73] *ONEm and M* (n 71), para. 28.
[74] *Callemeyn* (n 13), paras 11, 14; *Inzirillo* (n 35), paras 15-18; Case C-206/10 *Commission v Germany* EU:C:2011:283, paras 31, 49.

speaking, if Regulation 883/2004 applies, this should be unnecessary (although reference to Regulations 1612/68 or 492/2011 *after* establishing that Regulations 1408/71 or 883/2004 *do not apply* is unproblematic). Further discussion of Regulation 492/2011 could imply the decision under Regulation 883/2004 is not final or does not prevail over Regulation 492/2011. As the national measure is discriminatory under both Regulations, the better view is that referring to both bolsters the ECJ's decision and provides extra guidance to the national court. Underscoring this point, the ECJ uses the language of 'moreover'[75] and '[f]urthermore'[76] rather than any suggestion of altering the decision reached under Regulation 883/2004 (or 1408/71). Were the ECJ to rationalize the inter-relationship between norms more explicitly, this would provide much needed clarification on the benefits and persons covered by each measure.

4.1.3 Apparent Inconsistency: Considering the Lex Generalis First

In about twenty-five per cent of cases involving the possible inter-relationship between Regulations 883/2004 and 492/2011, the ECJ considers Regulation 492/2011 first or omits to consider Regulation 883/2004 at all. *Prima facie,* this suggest the ECJ is not relying upon the 'shall not affect' clause. On closer inspection, however, these cases result from unsystematic reasoning by the ECJ but not a different interpretative principle.

A simple explanation can account for most of the cases discussed here: the benefit in fact falls outside the scope of Regulation 883/2004.[77] What is lacking is an explicit clarification of this critical point. Thus, these cases do not amount to a divergence from orthodoxy. The ECJ's approach here contributes to the lack of clarity regarding how the measures inter-relate. For instance, the ECJ held in *Castelli* that it was 'appropriate' to analyse Regulation 1612/68 before any other norms[78] and did not consider Regulation

[75] *Callemeyn* (n 13), para. 14. Watson, discussing the reference to Regulation 1612/68 in *Callemeyn*, argues that '[t]he Court would seem to have found in these provisions an additional basis for its decision' (P Watson, *Social Security Law of the European Communities* (Mansell Publishing 1980) 107).
[76] *Inzirillo* (n 35), para. 18.
[77] This is the case in several cases relating to study finance: Joined Cases 389/87 and 390/87 *Echternach* EU:C:1989:130; *Meeusen* (n 19),; Case C-542/09 *Commission v Netherlands* EU:C:2012:346; Case C-359/13 *Martens* EU:C:2015:118; Case C-20/12 *Giersch* EU:C:2013:411; *Bragança Linares Verruga* (n 68); Joined Cases C-401/15 to C-403/15 *Depesme and Kerrou* EU:C:2016:955.
[78] *Castelli* (n 35), para. 8.

1408/71 after finding the national measure to be discriminatory.[79] Yet, at no point in its judgment did the ECJ explain why – was it because Mrs Castelli fell outside the personal scope of Regulation 1408/71 or because the benefit claimed was not social security? National courts faced with questions regarding the same benefit or similar personal circumstances may then struggle to determine which Regulation is applicable. This thesis calls for a more systematic approach.

The remaining cases are explicable by features of the case or how the case was argued. In *Commission v Greece (benefits for large families)* several benefits were in question, all of which were social advantages[80] while only some relating to health care were family benefits under Regulation 883/2004.[81] It may have seemed more sensible to start by discussing the bulk of the benefits in question before moving to the specific point regarding Regulation 883/2004. In *Mora Romero*, the referring court did not mention Regulation 883/2004 and so the ECJ perhaps decided first to clarify why the provisions cited by the referring court did not apply.[82] In *Commission v Luxembourg* the parties conceded that the benefit was a social advantage and had centred their arguments around this.[83] Although the end result did not differ because the ECJ considered Regulation 492/2011 first in each of these cases, if the ECJ had better communicated the role of the 'shall not affect' clause, applicants could better present their arguments.

4.2. Evaluation

So far, this Section has examined ECJ case law consistent with respect for the 'shall not affect' clause or the principle of *lex specialis*. At no point, however, does the ECJ confirm the principles of interpretation upon which it is relying. In most cases involving an overlap between Regulation 1612/68 or 492/2011 and Regulation 1408/71 or 883/2004, ECJ practice is consistent with the respecting the 'shall not affect' clause. In cases involving Directive 2004/38 there is far less case law. ECJ practice suggests that Regulations 1612/68 and 492/2011 take priority over the Directive, but that Regulation 883/2004 does not. Discussion now turns to offer an assessment of this approach in the

[79] *Castelli* (n 35), para. 13.
[80] Case C-185/96 *Commission v Greece (benefits for large families)* EU:C:1998:516, para. 21.
[81] *Commission v Greece (benefits for large families)* (n 80), para. 26.
[82] Case C-131/96 *Mora Romero* EU:C:1997:317, para. 9.
[83] *Commission v Luxembourg (childbirth and maternity allowances)* (n 16).

context of the specific case study adopted. The main argument put forward below is that respecting the 'shall not affect' clause and applying the principle of *lex specialis* secures the rights of Union citizens without damaging legal certainty.[84]

The first point to note is that respecting the 'shall not affect' clause and applying the principle of *lex specialis* will not always maximise the rights of Union citizens. For example, Section 2 outlined how Regulation 883/2004 – in contrast with Regulation 492/2011 and (in specific circumstances) Directive 2004/38 – does not always permit frontier workers to claim equal treatment in the Member State of employment. Should a conflict emerge between the measures here, complying with the 'shall not affect' clause in Regulation 492/2011 and the *lex specialis* nature of Regulation 883/2004 vis-à-vis Directive 2004/38 entails respect for the determination reached under Regulation 883/2004. This is so even if, under Regulation 492/2011, frontier workers can claim equal treatment in the Member State of employment.

However, the contention made here is that respect for the 'shall not affect' clause and for the principle of *lex specialis* do not unduly restrict the rights of Union citizens. In particular, neither principle prevents the non-prioritised norm or the *lex generalis* from applying residually. One measure can fill gaps left by the other in the framework for protecting Union citizens and their family members exercising the right to free movement. The result is a 'belt and braces' approach to the protection of equal treatment. For example, if a situation falls outside the material scope of Regulation 883/2004, the ECJ can still turn to Regulation 492/2011 to fill any lacunae.[85] In *Schmid*,[86] Mr Schmid was trying to claim a disability benefit for adults on behalf of his adult daughter. While the benefit fell within the definition of 'social security' under Regulation 1408/71 (as then in force), both Mr Schmid and his adult daughter fell outside the personal scope of that Regulation.[87] The ECJ then turned to consider Regulation

[84] One can interpret the inter-relationship between overlapping norms in a manner that always maximises fundamental rights protection. However, as will be discussed below, that approach lacks sufficient support in the applicable legal framework and is damaging to the general principle of legal certainty.
[85] Verschueren, 'Free Movement of Persons in the European Union and Social Rights' (n 45) 291.
[86] *Schmid* (n 17).
[87] Mr Schmid fell outside the scope of the Regulation as he had not been subject to Belgian social security legislation (para. 8). His daughter could not rely on the Regulation as members of a worker's family could only claim derived rights (para. 12).

1612/68. The ECJ held that the disability benefit was a 'social advantage'[88] and so Mr Schmid – as a former migrant worker – could rely upon the right to equal treatment.[89] Regulation 1612/68 filled a gap left by Regulation 1408/71 here on the equal treatment rights of workers (or former workers) where otherwise an obstacle to the free movement of workers may have arisen under Article 45 TFEU.

Linking to the ambiguity highlighted in Section 3, one might criticise the ECJ's application of Regulation 1612/68 in *Schmid* on the grounds that it undermines the specific decision by the EU legislature not to regulate these matters.[90] According to Advocate General Geelhoed the approach in *Schmid* 'cancels out' the decision to exclude certain persons from the scope of a particular measure.[91] From the perspective of norm inter-relationship, though, such a critique suffers from a fatal flaw: the measures do not conflict. *If* Regulation 1408/71 explicitly permitted discrimination against persons in the position of Mr Schmid and his daughter, allowing Mr Schmid to rely on Regulation 1612/68 would 'affect' that measure. When a person falls outside the personal scope of Regulation 1408/71, it is quite a leap to read this as a determination by the legislature that such persons should not be able to claim equal treatment to benefits covered by that Regulation.

The same would be true as regards the inter-relationship between Regulations 883/2004 and 492/2011 and Directive 2004/38: the Regulations, as *lex specialis,* set out specific rules on the prohibition of discrimination against the backdrop of Directive 2004/38 as the *lex specialis*. When a situation falls outside the material scope or personal scope of one of the Regulations, the principle of *lex specialis* does not prevent the ECJ from applying the *lex generalis*. Thus, in *Bragança Linares Verruga*, the ECJ suggested that Directive 2004/38 could be relied upon to determine eligibility for maintenance aid in cases not involving 'equal treatment of national workers and migrant workers.'[92] Where a situation falls within the personal and material scope of the *lex specialis*, there is no

[88] *Schmid* (n 17), para. 18.
[89] *Schmid* (n 17), para. 21.
[90] M Dougan, 'Expanding the Frontiers of Union Citizenship by Dismantling the Territorial Boundaries of the National Welfare States?' in C Barnard and O Odudu (eds), *The Outer Limits of European Union Law* (Hart 2009) 119-165, 139; Verschueren, 'The EU Social Security Co-Ordination System' (n 61) 199.
[91] Case C-212/05 *Hartmann* EU:C:2006:615, Opinion of AG Geelhoed, para. 50.
[92] *Bragança Linares Verruga* (n 68), para. 66.

scope for the *lex generalis* to apply. However, where the *lex generalis* also covers situations falling outside the *lex specialis*, 'nothing precludes that the *lex generalis* is still relevant and adds certain rights or obligations.[93] The aim of the *lex specialis* principle, as set out in Chapter 2, is to ensure respect for the intentions of the Union legislature. While one should be sensitive to context, the adoption of a *lex specialis* with narrower scope does not necessarily mean that the Union legislature intended to exclude the operation an overlapping norm with more general scope.[94]

Respecting the 'shall not affect' clause and the principle of *lex specialis* could be described as value neutral. Interpreting Regulation 883/2004 as a *lex specialis* in relation to Directive 2004/38 means, for instance, that more Union citizens can claim equal treatment given the broader personal scope of the Regulation. However, it also entails further restrictions given the habitual residence requirement (c.f. residence for the first three months under Directive 2004/38). There is, therefore, a trade-off inherent in adopting this approach: while it does not necessarily lead to the *greatest possible* respect for the right to equal treatment, it does respect explicit decisions of EU legislature, the institution empowered by the Treaties to adopt the measures necessary to secure free movement and equal treatment.

4.3. Summary

In sum, this Section showed how the vast majority of cases – particularly when an overlap arises between Regulations 883/2004 and 492/2011 – cohere with the expected approach. However, the ECJ fails to articulate clearly the principles it is relying upon in these cases. The following Section now turns to a minority of cases in which the ECJ adopts a different approach to the inter-relationship between overlapping norms.

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[93] J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (CUP 2003) 412. Similarly, the ILC notes how '[t]he application of the special law does not normally extinguish the relevant general law', see ILC, 'Fragmentation Report' (n 59) para. 82.

[94] Chapter 4 discussed how the exemption of activities connected to 'public service' from the free movement rules is best interpreted as precluding the application of Article 18 TFEU.

5. ECJ PRACTICE INCONSISTENT WITH THE 'SHALL NOT AFFECT' CLAUSE AND THE PRINCIPLE OF LEX SPECIALIS

5.1. Two Lines of Case Law

ECJ practice does not accord with applying either the 'shall not affect' clause or the principle of *lex specialis* in two different lines of case law: *Hendrix* and the 'lawful residence' cases. This Section starts by considering in detail how ECJ practice departs from the approach suggested by priority clauses and priority principles. Discussion then turns to why the ECJ might adopt a different approach and what principles the ECJ relies upon in the alternative to structure the inter-relationship between overlapping norms.

5.1.1 Hendrix and the 'Shall Not Affect' Clause

Only in one case, out of the eighty cases identified involving an overlap between the Regulations, does the ECJ adopt a different approach to the 'shall not affect' clause: *Hendrix*. Mr Hendrix – a Dutch national – was both working and residing in the Netherlands while in receipt of the Wajong (a special non-contributory benefit[95] *and* a social advantage[96]). After he moved his place of residence to Belgium, but continued to work in the Netherlands, the Dutch authorities stopped his Wajong payments.[97] The ECJ had to answer the question: did the Netherlands act lawfully in stopping Mr Hendrix's entitlement to the benefit?[98]

The overlapping Regulations conflicted here regarding who may claim equal treatment and in which Member State. On the one hand, *Meints*, *Meeusen* and *Hartmann* confirmed that frontier workers and reverse frontier workers (i.e. Union citizens working in their Member State of nationality and residing in a host Member State) could rely on Regulation 1612/68 to claim equal access to social advantages in a Member State of

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[95] *Hendrix* (n 18), paras 17-18.
[96] *Hendrix* (n 18), para. 49.
[97] *Hendrix* (n 18), para. 19. In Case C-112/91 *Werner* EU:C:1993:27, the ECJ held that 'reverse frontier workers' fell outside the scope of the free movement provisions. However, in *Hartmann* and *Hendrix*, the ECJ confirmed that a person who transfers their residence, but not their place of employment falls within the scope of the free movement provisions, see *Hartmann* (n 31), paras 17-20; *Hendrix*, para. 46. See further M Cousins, 'Free Movement of Workers, EU Citizenship and Access to Social Advantages' (2007) 14(4) *MJ* 343, 344; C O'Brien, 'Case Comment on *Hartmann, Geven* and *Hendrix*' (2008) 45(2) *CMLRev* 499, 504.
[98] *Hendrix* (n 18), para. 34.

(past) employment.[99] Under Regulation 1612/68, Mr Hendrix could thus potentially export Wajong payments to Belgium (his Member State of residence) from the Netherlands (his Member State of employment). Complicating matters, according to Article 10a of Regulation 1408/71, 'persons to whom this Regulation applies shall be granted the special non-contributory cash benefits … exclusively in the territory of the Member State in which they reside, in accordance with the legislation of that State'. As Mr Hendrix fell within the personal scope of Regulation 1408/71, that Regulation prevented him from exporting the Wajong payments to Belgium. Respecting the 'shall not affect' clause in Regulation 1612/68 (as in the extensive body of case law discussed above in Section 4), should mean that Article 10a of Regulation 1408/71 prevails.

When deciding Mr Hendrix's entitlement to Wajong payments, the ECJ began its analysis with Regulation 1408/71 (as the 'shall not affect' clause suggests), finding the decision to stop paying the benefit to be compatible with EU law. As a special non-contributory benefit, the Netherlands did not have to extend the Wajong to non-residents.[100] However, the ECJ then considered the position under Regulation 1612/68,[101] holding that any residence condition was indirectly discriminatory and required objective justification.[102]

Had the ECJ followed the 'shall not affect' clause, the analysis – if not the eventual decision given the ECJ's conclusion that the Dutch law was objectively justified and proportionate[103] – would have been quite different. After finding that the benefit was a special non-contributory benefit, the ECJ should have gone on to hold that the benefit

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[99] *Meints* (n 31), para. 51; *Meeusen* (n 19), para. 25; *Hartmann* (n 31), para. 38.
[100] *Hendrix* (n 18), para. 38.
[101] In earlier case law the ECJ had accepted the exportability of some social advantages for frontier workers, although Regulation 1408/71 had not applied in any of those cases.
[102] *Hendrix* (n 18), para. 50. This aspect of *Hendrix* has been criticised for contributing to the de-territorialisation of welfare. See M Dougan, 'Cross-border educational mobility and the exportation of student financial assistance' (2008) 33(5) *ELRev* 723, 731; O'Brien, 'Case Comment on *Hartmann, Geven* and *Hendrix*' (n 97) 512. What is more, the test applied by the ECJ has been criticised for leading to considerable legal uncertainty. The ECJ held that when determining if the restriction on movement was objectively justified the national court must be satisfied the national law does not lead to an "unacceptable degree of unfairness"', see *Hendrix* (n 18), paras 56-57. Martin notes that this 'test is one which seems impossible to answer in an objective way, so that it might be answered in radically different ways by judges in the same Member State', see D Martin, 'Case Comment on *Jia, Hartmann, Geven* and *Hendrix*' (2007) 9 *European Journal of Migration and Law* 457, 471.
[103] *Hendrix* (n 18), paras 54-56. This does not detract from the ECJ's willingness to depart from the rules set out in Regulation 1408/71.

was non-exportable under Regulation 1408/71. In earlier cases relating to the export of social advantages, Regulation 1408/71 did not apply and so the application of the 'shall not affect' clause did not arise; the benefit claimed in *Meints* and *Meeusen* fell outside the material scope of Regulation 1408/71,[104] while the applicant in *Hartmann* fell outside the personal scope of that Regulation.[105] Similarly, if the case had involved e.g. social assistance – benefits not covered by Regulation 1408/71[106] – turning to Regulation 1612/68 would be consistent with the 'shall not affect' clause.[107] Instead, contrary to the steady line of case law discussed above, the ECJ did not grant priority to Regulation 1408/71.

5.1.2 Regulation 883/2004 and Directive 2004/38: One Measure Preconditions the Other

The second strand of case law – the 'lawful residence' cases – concerns the inter-relationship between Regulation 883/2004 and Directive 2004/38. Out of seven cases in which an overlap arises *prima facie* between these measures,[108] five appear to diverge from the orthodox principles of interpretation set out above:[109] *Brey*,[110] *Dano*,[111]

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[104] The ECJ expressly made this point in *Meints*, noting that 'Regulation No 1408/71 does not apply to a compensation scheme, such as that in issue in the main proceedings, under which agricultural workers, whose contract of employment has been terminated… receive a benefit in the form of a single payment…following the termination of his contract of employment' (*Meints* (n 31), para. 35). In *Meeusen*, the applicant claimed study finance for their dependents.

[105] Mr Hartmann was a civil servant and so not an 'employed person' under Regulation 1408/71 (*Hartmann* (n 31), para. 11).

[106] Article 4(4).

[107] Similarly, the ECJ in *Leclere and Deaconescu* held that '[i]t follows that, for the purpose of examining their validity, those two categories of exceptions are not similar in nature since one, relating to special childbirth and adoption allowances, merely excludes certain categories of benefits from the scope of Regulation No 1408/71, while the other, concerning special non-contributory benefits, establishes that the State in which the recipient of the benefits concerned resides is responsible for paying such benefits' (*Leclere and Deaconescu* (n 65) para. 27).

[108] The referring court in *Gusa* asked whether, should the applicant fail to meet the criteria for lawful residence under Directive 2004/38, the applicant could nevertheless rely on Regulation 883/2004 to claim equal access to jobseekers allowance (a special non-contributory benefit). However, the relationship between the measures did not arise as the ECJ concluded that Mr Gusa retained the status of 'self-employed person' on the grounds that 'after having lawfully resided in and worked as a self-employed person in another Member State for approximately four years, that national has ceased that activity, because of a duly recorded absence of work owing to reasons beyond his control, and has registered as a jobseeker with the relevant employment office of the latter Member State', see Case C-442/16 *Gusa* EU:C:2017:1004, para. 46.

[109] For discussion of the other two cases, see Section 4 above.

[110] *Brey* (n 23).

[111] Case C-333/13 *Dano* EU:C:2014:2358.

Alimanovic,[112] *García-Nieto*[113] and *Commission v UK*.[114] These cases have generated considerable comment in academic literature; however, existing analysis does not focus on how the measures overlap or on their inter-relationship.[115]

Each case involved a challenge to national laws that either only granted equal access to certain benefits if the Union citizen fell within the personal scope of Directive 2004/38 – i.e. economic activity or sufficiency of resources – or sought to rely upon the derogations from equal treatment in the Directive. This was so *even though* the benefits in question fell within the material scope of both measures.[116] It will be recalled that Regulation 883/2004 has a broader personal scope and does not allow the same possibility to derogate. Each applicant (presumably) fell within the personal scope of Regulation 883/2004 and was habitually resident in the host Member State[117] and so denying the applicants benefits appeared incompatible with that measure. However, the applicants either were not lawfully resident under Directive 2004/38[118] or their situation fell within a derogation from the right to equal treatment.[119] The potential repercussions

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112 Case C-67/14 *Alimanovic* EU:C:2015:597.
113 Case C-299/14 *García-Nieto* EU:C:2016:114.
114 Case C-308/14 *Commission v UK* EU:C:2016:436.
115 Criticism of the case law has focused around: (1) the issue of proportionality and individualised assessment (see e.g. H Verschueren, 'Free Movement or Benefit Tourism: the Unreasonable Burden of *Brey*' (2014) 16(2) *European Journal of Migration and Law* 147, 170; D Thym, 'When Union Citizens Turn into Illegal Migrants: the *Dano* Case' (2015) 40(2) *ELRev* 249, 255; H Verschueren, 'Preventing "Benefit Tourism" in the EU: A Narrow or Broad Interpretation of the Possibilities Offered by the ECJ in Dano?' (2015) 52(2) *CMLRev* 363, 373; M Cousins, 'Case Comment on *Dano*' (2015) 22(2) *Journal of Social Security Law* 95, 100ff; P Minderhoud, 'Job-Seekers have a Right of Residence but no Access to Social Assistance Benefits under Directive 2004/38' (2016) 23(2) *MJ* 342, 346; N Nic Shuibhne, '"What I Tell You Three Times is True" Lawful Residence and Equal Treatment after *Dano*' (2016) 23(6) *MJ* 908, 920); (2) the indirectly or directly discriminatory nature of national rules (see e.g. M Cousins, '"The Baseless Fabric of this Vision": EU Citizenship, the Right to Reside and EU law' (2016) 23(2) *Journal of Social Security Law* 89, 102; C O'Brien, 'The ECJ Sacrifices EU Citizenship in Vain: *Commission v United Kingdom*' (2017) 54(1) *CMLRev* 209, 225-26); and (3) that the case law may lead to 'the creation of poverty on the territory of the host state' (see e.g. H Verschueren, 'Free Movement of EU Citizens: Including for the Poor' (2015) 22(1) *MJ* 10, 28).
116 In all cases except *Commission v UK,* the benefits claimed were social assistance under Directive 2004/38 and special non-contributory benefits under Regulation 883/2004: *Brey*, paras 33, 62; *Dano* (n 111), paras 63, 83; *Alimanovic* (n 112), paras 43-44; *García-Nieto* (n 113), paras 37, 52. In *Commission v UK,* the ECJ does not clarify the status of the benefits under Directive 2004/38, however the appear to meet the criteria for falling within the scope of the Treaty under the Directive and social security under the Regulation, see *Commission v UK* (n 114), para. 61.
117 Very little consideration is given to either of these aspects in the decisions. When discussing *Brey* and *Dano,* Lhernould and others argued that the applicants met the criteria for habitual residence, see Lhernould and others (n 62) 13.
118 The applicants in *Brey* and *Dano* failed to satisfy the sufficient resources requirement and meeting this threshold was a requirement for receiving benefits in *Commission v UK*: *Brey* (n 23), para. 57ff; *Dano* (n 111), paras 73-81; *Commission v UK* (n 114), paras 72, 80.
119 Article 24(2) of Directive 2004/38 allows a Member State to refuse social assistance during the first

of which norm the ECJ prioritises become clear here: denial of equal treatment appears compatible with Directive 2004/38 but not with Regulation 883/2004.

Confusingly, the ECJ does not prioritise either measure, presenting its solution as compatible with both measures. However, it reaches this result by reading – or 'embroidering'[120] – the (more restrictive) conditions for accessing benefits under Directive 2004/38 into Regulation 883/2004.[121] *How* the ECJ does this is worth considering in detail. When considering the compatibility of the national measures with Regulation 883/2004, the ECJ skirted over the distinct personal scope, non-discrimination clause and residence tests under that measure. Instead, the ECJ focused on Articles 11(3)(e) and 70(4) of Regulation 883/2004 which allocate responsibility among Member States.[122] According to the ECJ, these provisions do not 'lay down the conditions creating the right to social security benefits'[123] and it is for each Member State to lay down those conditions. What this statement ignores is the distinct personal scope of Regulation 883/2004 and the autonomous residence test under Articles 70(4) and 11(3)(e) for determining which Member State will be responsible.[124] This interpretation of the Regulation as only *coordinating* national laws and not setting any conditions allows the ECJ to conclude that imposing a lawful residence test is not unlawful.[125]

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three months of residence and to jobseekers. The applicants in *Alimanovic* were jobseekers, while the applicants in *García-Nieto* were in their first three months of residence: *Alimanovic* (n 112), paras 49-63; *García-Nieto* (n 113), paras 40-49.

120 O'Brien, 'Case Comment on *Commission v UK*' (n 115) 209.

121 See *Brey* (n 23), paras 43-44; *Dano* (n 111), para. 83; *Alimanovic* (n 112), para. 63; *García-Nieto* (n 113), para. 52; *Commission v UK* (n 114), paras 65-68. This interpretation of the case law is supported by Verschueren who noted that by 'applying the "right to reside"-test and the "unreasonable burden"-test under Directive 2004/38, the Court has added a supplementary requirement not present in the political agreement on the special non-contributory cash benefit', see Verschueren, 'Free Movement or Benefit Tourism' (n 115) 162. See also, C O'Brien, '*Civis Capitalist Sum*: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53(4) *CMLRev* 937, 951.

122 See Section 2.2.

123 *Commission v UK* (n 114), para. 65. See also *Brey* (n 23), para. 41; *Dano* (n 111), para. 83; *García-Nieto* (n 113), para. 52.

124 This is despite the autonomous residence test being recently confirmed by Case C-394/13 *B* EU:C:2014:2199, paras 26, 34 and by Regulation 987/2009 which lists a number of relevant factors for determining where a person's centre of interest lies. These include the duration and continuity of presence in the relevant Member States, family status and family ties of the person concerned (and does not include sufficiency of resources) Regulation 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems [2009] OJ L 284/1.

125 *Commission v UK* (n 114), paras 67-68.

Were the ECJ applying the principle of *lex specialis* – prioritising Regulation 883/2004 – the result would have been quite different. The applicants appeared to satisfy the personal scope of Regulation 883/2004[126] and the benefits concerned fell within its material scope as special non-contributory benefits or social security. After establishing this much, it should only have remained for the ECJ to confirm the responsible Member State (under Articles 11(3)(e) or 70(4)) by applying the habitual residence test. Under Regulation 883/2004 alone the applicants could claim equal treatment in the host Member State with the ensuing consequence that any restriction based on 'lawful residence' failed to implement EU law properly. The applicants would still ne*ed* to satisfy other national conditions for receiving the benefit such as fitting into the required income brackets, having a child or being of a certain age.[127] These national conditions cannot, however, curtail the personal scope of the Regulation or what amounts to habitual residence given the fundamental role of these concepts fundamental in *coordinating* entitlement.[128] In adopting an approach that overrides these aspects of Regulation 883/2004, the ECJ departs from the principle of *lex specialis*.

5.1.3 Summary

Both the *Hendrix* judgment and the lawful residence cases summarised above do not follow the guidance derived from the 'shall not affect' clause or the principle of *lex specialis*. The question arising is why, and what principles of interpretation the ECJ is relying upon instead. Do these decisions, while departing from what most might assume concerning the inter-relationship between norms, in fact represent carefully reasoned exceptions?

5.2. Alternative Rationales

The ECJ's failure to *explain* cases fully makes it difficult to identify what prompted the departure – especially in *Hendrix* – from consistent case law. This Section attempts to

[126] The applicants in each case had moved their place of residence to the host Member State with family members and/or to join family members already residing in the host Member State. In *Alimanovic* all the children were born in the host Member State and lived there for several years before returning to their Member State of nationality for several years.
[127] Coucheir and others (n 56) 6; O'Brien, 'Case Comment on *Commission v UK*' (n 115) 221.
[128] See, *Commission v UK* (n 114), para. 71.

infer any alternative interpretative principles upon which the ECJ might be relying. To begin with, though, discussion considers why the ECJ adopted a different approach

The ECJ's decision in *Hendrix* manifests a misunderstanding of the role of priority clauses. The Court cites the 'shall not affect' clause,[129] but still turns to consider Regulation 1612/68 even after establishing that Regulation 1408/71 did not require export of the benefit in question. This differs from the large number of cases discussed in Section 4 in which the ECJ appears to prioritise Regulation 1408/71– at least implicitly – on the grounds of the 'shall not affect' clause.[130] As noted above, in *Commission v France*, the ECJ held that turning to consider Regulation 1612/68 was consistent with the 'shall not affect' clause *because* the benefit in question fell outside the material scope of Regulation 1408/71;[131] thereby implying that if Regulation 1408/71 covers the benefit, turning to Regulation 1612/68 would breach the 'shall not affect' clause. This exact situation occurred in *Hendrix*. Why then did the ECJ not follow this approach?

The ECJ says no more on this point. The Advocate General is, however, more forthcoming. She considered that the 'shall not affect' clause did not imply 'any precedence for [Regulation 1408/71] rather it requires … [that] the regulations should apply independently of one another, that is to say, in parallel.'[132] Allowing for the exportability of special non-contributory benefits, on this reasoning, was not incompatible with the 'shall not affect' clause since it understands the Regulations as being on separate tracks with the clause doing little to introduce any priority between them. However, this is a fundamental departure from the generally accepted consequences of such a clause, as evidenced by the weight of authority before *Hendrix,* which is usually understood as prioritising one measure over another.[133] Which norm ought to apply becomes, if anything, more complicated.

[129] *Hendrix* (n 18), para. 51.
[130] See Section 4 above.
[131] *Commission v France* (n 65), para. 44.
[132] Case C-287/05 *Hendrix* EU:C:2007:196, Opinion of AG Kokott, para. 54.
[133] See Chapter 2, Section 3.2.

Advocate General Kokott also discussed the principle of *lex specialis,* even though the existence of a priority clause should have rendered recourse to priority principles unnecessary. Her reflections suggest confusion over how priority principles operate, underscoring the need for the ECJ to rely on priority clauses more explicitly when faced with norm overlaps. Advocate General Kokott in *Hendrix* considered that even though 'Regulation No 1612/68 is formulated in general terms whereas Regulation No 1408/71 contains specific provisions for the field of social security [this does not] permit the conclusion that Regulation No 1408/71 as *lex specialis* takes precedence over Regulation No 1612/68.'[134] However, it is not clear why she rejects the relevance of the *lex specialis* principle*:* is it because she considers that the principle itself has no role to play in determining the inter-relationship between norms in the EU legal order, or is it because the overlapping Regulations lack the necessary connection to understand one of them as a *lex specialis*?

One could also explain the residence cases on the grounds that it was not clear how the principle of *lex specialis* operated in this context. Section 3 outlined how the application of the principle of *lex specialis* is not always clear-cut and often involves a contextual assessment. In the residence cases, the explanation for the outcome might be that the ECJ understands Directive 2004/38 as more specialised. The ECJ stressed the role of Regulation 883/2004 as a measure for *coordination* which 'is not intended to lay down the conditions creating the right to social security benefits'.[135] and implies, as Nic Shuibhne notes, that Regulation 883/2004 is somehow lacking in content and could not 'be the sole source of conditions determining eligibility for social security benefits'.[136] However, as set out above, Regulation 883/2004 appears more specialised following a contextual analysis.

Turning now to consider the possible rationales underpinning the ECJ's case law, one way of understanding both lines of case law is that the ECJ shapes the relationship between norms to fit a particular substantive value. On this view, it does not matter

[134] *Hendrix,* Opinion of AG Kokott (n 132), para. 55.
[135] *Dano* (n 111), para. 83. See also *Brey* (n 23), para. 41; *García-Nieto* (n 113), para. 52.
[136] Nic Shuibhne (n 115) 915.

which measure is more specific or whether there is a priority clause: the ECJ interprets the measures in a manner that best achieves the substantive goal.

The ECJ in *Hendrix* arguably interprets the overlapping measures in line with the aim of *achieving the greatest freedom of movement for workers*. The ECJ outlines the need to interpret Regulation 1408/71 in line with this aim.[137] Only after asserting this point does the ECJ turn to Regulation 1612/68. Similarly, in the residence cases, one can understand the ECJ as interpreting the measures in a manner that aims to *safeguard Member State welfare systems*.[138] The ECJ relies instrumentally on Recital 10 of Directive 2004/38, which states that '[p]ersons exercising their right of residence should not … become an unreasonable burden on the social assistance system of the host Member State.'[139] And the cases are replete with references e.g. to preventing economically inactive Union citizens from relying on 'the host Member State's welfare system to fund their means of subsistence'.[140] Furthermore, in *Alimanovic,* the ECJ held that if a person without a right of residence under Directive 2004/38 could claim social benefits on the same terms as nationals of the host Member State, this 'would run counter to an objective of the directive… namely preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State.[141] Given that this would be the precise consequence of prioritising Regulation 883/2004 this 'all paint[s] a picture of a new teleological principle – the need to accommodate Member States' desires to discriminate, in order to avoid offending national welfare sensitivities'.[142]

Another possible rationale behind both lines of case law is that the ECJ attributes greater weight to one measure. This introduces a hierarchy through the back door: we

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[137] *Hendrix* (n 18), para. 52.
[138] *Commission v UK* does not fit with the rest of the case law here as the factors listed below do not feature in the ECJ's decision. The result would, however, fit with this approach.
[139] *Brey* (n 23), para. 54; *Dano* (n 111), para. 74; *Alimanovic* (n 112), para. 50; *García-Nieto* (n 113), para. 39. There is an attempt made in *Brey* to rebalance the focus of the judgment and introduce other aims via proportionality analysis. In particular, the ECJ refers to Directive 2004/38's objective 'to facilitate and strengthen the exercise of Union citizens' primary right to move and reside freely within the territory of the Member States' (*Brey* (n 23), para. 71). Later cases appear to depart from this approach, see Minderhoud (n 115) 346.
[140] *Dano* (n 111), para. 76.
[141] *Alimanovic* (n 112), para. 50. See also Case C-333/13 *Dano* EU:C:2014:341, Opinion of AG Wathelet, paras 106-07.
[142] O'Brien, 'Case Comment on *Commission v UK*' (n 115) 240.

have two measures of the same formal status but the ECJ elevates one, not on the basis of recognised interpretative techniques that apply in most of the relevant case law, but on its normative underpinnings.

One could understand the ECJ in *Hendrix* as giving greater weight to Regulation 1612/68 on the grounds that it is more closely connected to the aims of free movement and thereby also to the Treaty. Evidence for this approach is found in the statement that Article 7(2) of Regulation 1612/68 is 'the particular expression' of the right to equal treatment in the Treaty and so requires the same interpretation.[143] An effort is made in this statement to link Regulation 1612/68 to Article 45 TFEU in a way that Regulation 1408/71 is not. But the brevity of the ECJ's reasoning makes it difficult to determine which factor is more important – the need to secure free movement or the particular link between Regulation 1612/68 and Article 45 TFEU. If the latter, why not just rely directly on Article 45 TFEU?

There are some signs of implicit recourse to Article 45 TFEU: Advocate General Kokott notes that 'the requirements of the Treaty as a superior source of law must be observed' and that simply because 'a national measure may be consistent with a provision of secondary legislation… does not have the effect of removing that measure from the scope of the Treaty's provisions.[144] Similarly, the ECJ notes that 'Mr Hendrix falls within the scope of the provisions of the Treaty on freedom of movement for workers.'[145] One reading of the case is, then, that while the ECJ does not invalidate Regulation 1408/71, there is still a need to consider whether the situation is consistent with the Treaty.[146] If the ECJ is relying on Regulation 1612/68 as a proxy for Article 45 TFEU, it fails to clarify this point. Throughout the judgment in *Hendrix,* the ECJ

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143 *Hendrix* (n 18), para. 53. This could also be understood as suggesting that the situation still falls within the scope of the Treaty.
144 *Hendrix,* Opinion of AG Kokott (n 132), para. 56 (emphasis added). See also Cousins, 'Free Movement of Workers, EU Citizenship and Access to Social Advantages' (n 97) 351.
145 *Hendrix* (n 18), para. 60.
146 This argument is made by Dougan who notes 'the Court in cases such as *Hendrix* was clearly willing to employ the primary Treaty provisions as a means of distorting the allocation of financial responsibilities intended by the Union legislature in respect of certain benefits', see M Dougan, 'Judicial Activism or Constitutional Interaction? Policy making by the ECJ in the Field of Union Citizenship' in H Micklitz and B De Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2011) 113-147, 144. See also Dougan, 'Expanding the Frontiers of Union Citizenship' (n 87) 144; Verschueren, 'The EU Social Security Co-Ordination System' (n 61) 192-96.

reasons on the basis of Regulation 1612/68 and appears to rely upon that measure to achieve the desired result. How Article 45 TFEU relates to Regulation 1612/68 also becomes less rather than more clear on this understanding. Linking back to the conclusions reached in Chapter 3, if – as would be suggested by reliance of Regulation 1612/68 as a proxy for Article 45 TFEU – Regulation 1408/71 is in breach of the overlapping Treaty norm, the ECJ should engage in legality review and invalidate the offending provision. If the rule preventing the export of certain benefits under Regulation 1408/71 is compatible with the Treaties,[147] then Chapter 3 suggests that that Regulation ought to be determinative.

Clearer evidence of hierarchy between the secondary measures themselves is found in the cases concerning Directive 2004/38 and perhaps better explains the ECJ's reasoning in that line of case law. In *Commission v UK*, Advocate General Cruz Villalón suggests that Directive 2004/38 is of a more foundational status than Regulation 883/2004, and underlies the exercise of the right to move and reside. After outlining the *limits* in the Treaty on the exercise of the right to move and reside[148] he noted that these limits are laid down in substance in Directive 2004/38.[149] Given that Regulation 883/2004 is closely linked to Union citizenship and the right to move and reside,[150] the Advocate General held that the conditions set out in Directive 2004/38 must 'remain fully effective within the framework of [Regulation 883/2004]'.[151] While the ECJ does not explicitly adopt this reasoning, the result is the same – the requirements of the Directive *precondition* the right to equal treatment under the Regulation, at least for the economically inactive. Directive 2004/38 is then given the status of 'super-norm'[152] or a 'higher constitutional principle of exclusion'.[153]

147 The ECJ accepted that the rule preventing export fell well within the leeway granted to the legislature in this area, see Case C-20/96 *Snares v Adjudication Officer* EU:C:1997:518, para. 49.
148 Case C-308/14 *Commission v UK* EU:C:2015:666, Opinion of AG Cruz Villalón, paras 67-69. Article 18(1) TFEU only grants the right to non-discrimination '[w]ithin the scope of application of the Treaties and without prejudice to any special provisions contained therein'. Articles 20 and 21 TFEU state that the right to move and reside are subject to the 'conditions and limits defined by the Treaties and by the measures adopted thereunder'.
149 *Commission v UK,* Opinion of AG Cruz Villalón (n 148), para. 71.
150 *Commission v UK,* Opinion of AG Cruz Villalón (n 148), para. 70.
151 *Commission v UK,* Opinion of AG Cruz Villalón (n 148), para. 72.
152 Nic Shuibhne (n 115) 926.
153 O'Brien, 'Case Comment on *Commission v UK*' (n 115) 241.

In both lines of case law discussed here the ECJ appears to adopt either a different understanding of how the principle of *lex specialis* and the 'shall not affect' clause apply or ignores them. Certainly, the ECJ appears more concerned by other factors. In *Hendrix,* the ECJ appears to interpret the measures in a manner that achieves the greatest possible free movement or prioritises Regulation 1612/68 on the grounds that it gives expression to Article 45 TFEU. In the lawful residence cases, it is possible to explain the ECJ's reasoning as aiming to safeguard Member State welfare systems, or as based upon an understanding that Directive 2004/38 is somehow more fundamental and so supersedes the Regulation.

5.3. Evaluation

It is argued here that prioritising a particular substantive result or elevating one measure due to a particular understanding of the EU legal order does not work well in the context of overlapping norms. More specifically, the ECJ's approach in *Hendrix* and the lawful residence cases has the potential to undermine both legal certainty and institutional balance.

In opting not to follow the 'shall not affect' clause in *Hendrix* the ECJ engenders considerable legal uncertainty. What is problematic about the decision is not just the reversal of extensive earlier case law on the inter-relationship between Regulations 883/2004 and 492/2011 – case law research identifying seventy-nine earlier cases adopting a different approach; it is instead the lack of underlying rationalisation. It is not clear whether the ECJ reaches its decision because it is prioritising a particular substantive result, or because it is elevating one measure due to a particular understanding of the EU legal order.

If one asks why this value (i.e. the greatest possible free movement) or why understand Regulation 1612/68 as more fundamental, it is difficult to find a persuasive answer and see how the ECJ's approach in *Hendrix* could translate into a more general principle of norm inter-relationship. In several cases the ECJ accepts limitations on the right to equal treatment, even if these did not achieve the greatest possible freedom of

movement.[154] Similarly, although there is *some* justification for understanding Regulation 1612/68 as especially linked to directly effective rights in the Treaty – the preamble to Regulation 1612/68 refers to how that measure is necessary to 'enable the objectives laid down in Articles [45 and 46 TFEU] in the field of freedom of movement' whereas Regulation 1408/71 only makes explicit reference to Article 48 TFEU – Regulation 1408/71 is also closely linked to Article 45 TFEU. The legal basis of Regulation 1408/71 (Article 48 TFEU) only empowers the Union legislature to adopt 'such measures in the field of social security as are necessary to provide freedom of movement for workers' and the ECJ acknowledges that 'the principle of non-discrimination laid down in Article 45 TFEU was implemented, in relation to social security for migrant workers, by Article 3(1) of Regulation No 1408/71.'[155] This lack of any clear rationale explaining the ECJ's approach makes it difficult to see how it could offer guidance in other cases.

The ECJ's approach in the lawful residence cases also suffers from a lack of clarity, again potentially damaging the principle of legal certainty. Instead of a relationship of priority between Regulation 883/2004 and Directive 2004/38, their inter-relationship will oscillate depending upon which measure best achieves the selected aim in the circumstances. Furthermore, the legal gymnastics relied upon by the ECJ in the lawful residence cases suggests that predicting how the measures will inter-relate will be particularly difficult; especially, since there are several different ways to achieve one aim. What is more, it is hard to identify the limits of the ECJ's approach; in *Commission v UK,* for instance, the Court comes close to rewriting Regulation 883/2004.

It is also difficult to see how the ECJ's approach to the inter-relationship between Regulation 883/2004 and Directive 2004/38 could translate into workable guidance for other norm overlaps. Again, the ECJ offers little justification for why it structures the relationship between norms around the aim of protecting Member State welfare systems. While Directive 2004/38 does refer to the need to protect welfare systems, other aims are set out in the preamble[156] and there is scant support in primary law for

[154] E.g. Case C-154/05 *Kersbergen-Lap* EU:C:2006:449, para. 44; Case C-208/07 *von Chamier-Gliszczinski* EU:C:2009:455, paras 53-54.
[155] *Lachar* (n 65), para. 28
[156] E.g. Recitals 1-3.

the protection of the public finances of the Member State; instead, there is a primary right to equal treatment as well as social policy goals to combat poverty and exclusion.[157] Similarly, the rationale that Directive 2004/38 is somehow more fundamental also rests on shaky foundations. Regulation 883/2004 and Directive 2004/38 were adopted on the same day (29 April 2004) making it 'very strange that the Union legislature would have wanted to limit the entitlement to a benefit established by the first instrument to a supplementary condition laid down in the second instrument.'[158] There is also no hierarchy between the legal bases and Regulations 883/2004 and Directive 2004/38, which were both adopted using the same legislative procedure, thereby granting each the same degree of democratic legitimacy. It is difficult to find sufficient justification for why the requirements or conditions of one measure should be elevated over another measure with the same status and how this approach might offer guidance in other situations.

In contrast, as noted above, respecting priority clauses and the principle of *lex specialis* offers more workable guidance and greater predictability in outcome. As evidenced by the extensive body of case law pre- and post-dating the ECJ's decision in *Hendrix,* there is a generally accepted understanding of priority clauses that the ECJ usually follows. Where there is no priority clause, there may initially be some uncertainty over norm inter-relationships due to the difficulties surrounding which norm is the *lex specialis*. Chapter 2 set out certain criteria for identifying the *lex specialis* that Section 3 of this Chapter showed could be applied, with some success, to the overlap between the Regulations and Directive 2004/38. Were the ECJ to set out more clearly the relevant criteria for identifying the *lex specialis*, this would enhance legal certainty. After clarification by the ECJ of which norm is the *lex specialis*, the inter-relationship between norms would be more predictable.

Prioritising a particular aim or elevating one measure above another also has the potential to undermine the principle of institutional balance and the principle of mutual sincere cooperation between institutions set out in Article 13(2) TEU. Given that Articles 46 and 48 TFEU (alongside Articles 18 and 21 TFEU) specifically empower the

[157] See e.g. Article 3(5) TEU; Article 34(3) CFR.
[158] Verschueren, 'Free movement or benefit tourism' (n 115) 162.

Union legislature to adopt measures combatting nationality discrimination, securing the free movement of workers and coordinating entitlement to social security, the Treaty framers clearly intended for the Union legislature to have a say in defining the extent of the right to non-discrimination on grounds of nationality in the exercise of free movement rights. Unless that legislation is inconsistent with EU primary law (in this context, the ECJ had previously accepted that the measures adopted fell well within the leeway granted to the legislature[159]), the principle of institutional balance suggests that the ECJ ought to respect the decisions reached by Union legislature about where the balance between free movement and protection of public finances should lie. Instead, as O'Brien argues, the result is that the ECJ has 'curbed, rewritten, and even rendered obsolete, provisions of Regulation 883/2004' (and Regulation 1408/71).[160]

5.4. Summary

This Section outlined ECJ practice that does not cohere with either the 'shall not affect' clause or the principle of *lex specialis* (depending upon the overlap) and argued that, instead, other factors appear to motivate the ECJ's approach. In *Hendrix,* the ECJ's approach is consistent with either prioritising free movement as a goal or elevating Regulation 1612/68 on the grounds of its connection to Article 45 TFEU. In the lawful residence cases, the ECJ appears to grant superior status to Directive 2004/38 as underlying the right to move and reside.

The tension between competing constitutional concerns becomes apparent here. By prioritising certain substantive goals or by according certain legislative measures particular significance, the ECJ negatively impacts upon both legal certainty and institutional balance. In contrast, respecting the 'shall not affect' clause or the principle of *lex specialis* entails accepting the choices made by the Union legislature over who can claim equal access to which benefits, which – as noted in Section 4.2 above – may not maximise the rights of Union citizens *per se.* The balance between competing considerations will always be difficult to strike, but the uncertainty and the impact on institutional balance that follow from the ECJ's decisions in *Hendrix* and the lawful residence cases suggest that accepting certain limitations on the equal treatment rights of

[159] *Snares* (n 147), para. 49.
[160] O'Brien, 'Case Comment on *Commission v UK*' (n 115) 242.

Union citizens is a worthwhile trade off. As argued in Chapter 3, should secondary law unduly restrict the prohibition on discrimination on grounds of nationality as set out in the Treaties, it remains open to the ECJ to invalidate (parts of) secondary Union law.

6. CONCLUSION

This Chapter assessed how the ECJ resolves overlaps between secondary norms. As a case study, this Chapter examined overlapping norms of secondary Union law prohibiting discrimination of grounds of nationality specifically with regard to accessing certain social benefits. The Chapter reaches two main conclusions; first, the ECJ will almost always respect any priority clauses; but, secondly, in the absence of a priority clause, ECJ practice does not always cohere with the approach dictated by conventional interpretative principles, even though this would better maintain a balance between competing constitutional considerations.

Where overlapping norms of the same status overlap, existing approaches to norm inter-relationship suggest that the ECJ should apply any priority clauses and – in the absence of an express clause – either the principle of *lex specialis* or the principle of *lex posterior*. In the context of the case study adopted, existing approaches meant 'shall not affect' clause in Regulation 492/2011 should prioritise Regulation 883/2004 in the event of a conflict. On the relationship between the Regulations and Directive 2004/38, Section 3 showed how reliance on the *lex posterior* principle would lead to illogical conclusions but argued that the principle of *lex specialis* offered workable guidance to the ECJ. Focusing on the personal and material scope of the measures as well as looking to each measure in its wider context, it was argued that the Regulations should both be understood as *lex specialis* vis-à-vis Directive 2004/38.

Extensive case law analysis then showed that, where there is a priority clause, the ECJ will almost always rely on that clause to structure the inter-relationship between overlapping norms. This finding coheres with those of Chapter 4 on the role played by the 'without prejudice' clause and suggests that it would be good practice for the Union legislature to include priority clauses when it foresees the possibility of overlap. The ECJ does cite the priority clause as justification for its resolution of a question arising from norm overlap in one case. In most cases, the ECJ does not expressly cite the priority

clause as underpinning norm inter-relationships, which can sometimes – as discussed in Sections 4.1.2 and 4.1.3 – lead to confusion (even if only *prima facie*). Were the ECJ to refer more explicitly to the 'shall not affect' clause, this would avoid any ambiguity over norm inter-relationship. Where there is no priority clause, ECJ practice only coheres with the principle of *lex specialis* in less than half of the cases identified. Furthermore, in none of the cases surveyed does the ECJ refer to the principle of *lex specialis*.

Section 5 examined the *Hendrix* decision and the lawful residence cases in which ECJ's approach to norm inter-relationship did not fit with application of the 'shall not affect' clause or the principle of *lex specialis*. All of these cases attracted considerable academic comment, although not from the perspective of norm overlap.[161] What is interesting, as also seen in Chapter 3, is the correlation between cases widely perceived as controversial and a departure from standard approaches to norm inter-relationship. When searching for an alternate rationalisation of the ECJ's approach to norm inter-relationship in *Hendrix* and the lawful residence cases, it was argued that the ECJ's approach better fits with a guiding principle that either aimed to prioritise a particular value, or attributed particular weight to one measure. What is striking about the ECJ's decisions in *Hendrix* and the lawful residence cases is how the ECJ essentially uses norm inter-relationship to rebalance conclusions reached by the Union legislature in favour of alternative policy goals. As this Chapter shows, this can have serious consequences for legal certainty and the principle of institutional balance. Focusing on guiding principles guards against impulses to 're-decide' and places the onus for determining a Union citizen's eligibility for social benefits back on the Union legislature, which is where the Treaties also allocate such responsibility.

Having discussed overlaps between primary and secondary Union law and between norms of the same rank, discussion now turns to an overlap that evades easy classification: between the Charter and general principles of Union law.

[161] See n 102 and n 115 above.

Chapter Six

Interactions between the Charter and Overlapping General Principles

1. INTRODUCTION

This Chapter examines how the ECJ approaches the inter-relationship between the EU Charter of Fundamental Rights and overlapping general principles of Union law. Article 6 TEU confirms not only that '[t]he Union recognises the rights, freedoms and principles set out in the Charter … which shall have the same legal value as the Treaties',[1] but also that '[f]undamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.' What is not explicit is the inter-relationship between these different sources of EU fundamental rights.

In contrast to other Chapters, when faced with an overlap between the Charter and general principles *prima facie* it is not clear whether there is a priority clause or which priority principle might offer interpretative guidance to the ECJ. The horizontal clauses in the Charter (such as Articles 52(2) and 52(4) CFR) and Article 6 TEU do not refer expressly to the relationship between the Charter and general principles. The unwritten nature of general principles also leads to controversy over their rank in the hierarchy of norms, their content and when they became legally binding. This leads to difficulties in determining which out of the principles of *lex superior, lex specialis* and *lex posterior* could apply. This Chapter argues that only Article 6(3) TEU and the principle of *lex superior* offer any workable guidance to the ECJ when faced with an overlap between the Charter and general principles. Treating the Charter as *lex superior* requires a modification of the principle for the specific context of the EU legal order and, briefly put, requires that the Charter essentially 'replaces' the overlapping general principle,

[1] Article 6(1) TEU.

even if (although unlikely) the overlapping general principles offered more extensive protection from discrimination.[2]

To test the ECJ's approach to norm inter-relationship here, this Chapter examines the inter-relationship between Article 21(1) CFR and overlapping general principles prohibiting status discrimination. Article 21(1) CFR prohibits:

> Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.

Despite the Charter's aim to codify the rights already protected by Union law, Section 2 shows that several divergences remain between Article 21(1) CFR and overlapping general principles.

Doctrinal analysis shows that, while the ECJ normally relies directly on the Charter, the ECJ still refers to general principles. Overall, it is submitted: first, that the ECJ needs to clarify better the continuing role of general principles to prevent any confusion; and, secondly, the ECJ needs to base its reasoning in fundamental rights cases more explicitly on the Charter. This should, it is argued, enhance EU fundamental rights protection.

2. CASE STUDY: THE OVERLAP BETWEEN GENERAL PRINCIPLES AND ARTICLE 21(1) CFR

This Chapter examines the ECJ's approach to overlaps between Article 21(1) CFR and general principles prohibiting status discrimination. According to Article 21(1) CFR:

> Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

This provision, as well as adding additional prohibited grounds of discrimination, gives written expression to the general principles previously recognised by the ECJ, namely,

[2] An exception here might be Article 41 CFR, which is of more limited application to Union institutions and expressly refers to general principles. See further, HH Hofmann and BC Mihaescu, 'The Relation between the Charter's Fundamental Rights and the Unwritten General Principles: Good Administration as the Test Case' (2013) 9 *EuConst* 73.

prohibitions of discrimination on the grounds of sex,[3] age,[4] race and ethnic origin,[5] religion[6] and sexual orientation.[7] A general principle prohibiting discrimination on grounds of disability has not been explicitly recognised, but the ECJ has referred to 'the general principle of non-discrimination' in cases relating to disability.[8] Relatedly, the ECJ has recognised 'a general principle of equality *tout court* (i.e. a principle that is not linked to any discrimination ground)'[9] which 'requires that similar situations shall not be treated differently unless differentiation is objectively justified'.[10]

Article 21(1) CFR and the corresponding general principles also overlap with several directives. This secondary law framework – outlined in Chapter 1 (and discussed, in connection with the prohibition on discrimination on grounds of sex in Chapter 3) – receives only brief mention here. The reason for this is that the existence of the Charter of Fundamental Rights means that the relationship between general principles and secondary Union law to some extent hinges on the ECJ's approach to overlaps between general principles and the Charter. This is not to say that the inter-relationship between general principles and secondary law does not remain a live issue; however, this is mostly in areas not covered by the Charter and so falling outside of the non-discrimination case study adopted by this thesis.[11]

Some comment on the various directives prohibiting status discrimination is somewhat inevitable, though, so it is necessary briefly to recap the main measures here. Article 21(1) CFR and the general principle prohibiting sex discrimination overlap with

[3] Case 149/77 *Defrenne III* EU:C:1978:130, paras 26-27.
[4] Case C-144/04 *Mangold* EU:C:2005:709, para. 75.
[5] Case C-83/14 *CHEZ Razpredelenie Bulgaria* EU:C:2015:480, para. 58.
[6] Case 130/75 *Prais* EU:C:1976:142, para. 10; Case C-414/16 *Egenberger* EU:C:2018:257, para. 76.
[7] Case C-147/08 *Römer* EU:C:2011:286, para. 60.
[8] Case C-354/13 *FOA* EU:C:2014:2463, para. 32
[9] C Tobler, 'The Prohibition of Discrimination in the Union's Layered System of Equality Law: From Early Staff Cases to the *Mangold* Approach' in A Rosas, E Levits and Y Bot (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (TMC Asser Press 2013) 443-469, 444.
[10] Joined Cases 201 and 202/85 *Klensch* EU:C:1986:439, para. 9.
[11] For discussion, see Case C-101/08 *Audiolux* EU:C:2009:410, Opinion of AG Trstenjak.

Directives 79/7,[12] 2004/113,[13] 2006/54[14] and Directive 2010/41[15] prohibiting discrimination on grounds of sex in the fields of social security, access to goods and services, employment and self-employment respectively. Article 21(1) CFR and corresponding general principles also overlap with Directive 2000/43 prohibiting discrimination on grounds of race;[16] and Directive 2000/78 prohibiting discrimination on grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation.[17]

This Section starts by outlining how overlaps developed between the Charter and general principles. Although the history of fundamental rights protection in the EU is well-known,[18] some context is necessary since – as is argued here – the development of EU fundamental rights protection affects how the ECJ should approach overlaps.

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[12] Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1979] OJ L 6/24.
[13] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L 373/37.
[14] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/23. The Directive 2006/54 consolidates and amends several earlier Directives including Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L 45/19; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L 39/40; Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes [1986] OJ L 225/40; Council Directive 96/97 amending Directive 86/378 on the implementation of the principle of equal treatment for men and women in occupational social security schemes [1997] OJ L14/13; Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [2002] OJ L 269/15. For further discussion, see Chapter 3.
[15] Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC [2010] OJ L 180/1.
[16] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22.
[17] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.
[18] See further e.g. J Coppel and A O'Neill, 'The European Court of Justice: Taking Rights Seriously' (1992) 29(4) *CMLRev* 669; JH Weiler and NJ Lockhart, '"Taking rights seriously" seriously: The European Court and its fundamental rights jurisprudence – part I' (1995) 32(1) *CMLRev* 51; JH Weiler and NJ Lockhart, '"Taking rights seriously" seriously: The European Court and its fundamental rights jurisprudence – part II' (1995) 32(2) *CMLRev* 579; P Alston (ed), *The EU and Human Rights* (OUP 1999); S Smismans, 'The European Union's fundamental rights myth' (2010) 48(1) *JCMS* 45; G de Búrca, 'The Evolution of EU Human Rights Law' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 465-97.

2.1. The Development of EU Fundamental Rights

The Treaty of Rome included no express reference to fundamental rights.[19] However, partly responding to declarations by national courts (particularly the German Constitutional Court) that – if necessary – they would review EU law against domestic fundamental rights standards,[20] the ECJ held in *Internationale Handelsgesellschaft* that:

> … respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to member states, must be ensured within the framework of the structure and objectives of the Community.[21]

Later, in *Nold,* the ECJ clarified that the EU fundamental rights standard also drew upon 'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories'.[22] Emphatically, national and international law only supplied 'guidelines'[23] for the development of an autonomous EU standard.

Over the decades following *Internationale Handelsgesellschaft,* the ECJ developed an unwritten catalogue of fundamental rights enshrined in the general principles of Union law. Alongside the judicial construction of EU fundamental rights protection, the Member States incorporated additional references to fundamental rights within the Treaty framework. The Maastricht Treaty formally recognised that fundamental rights were part of EU law,[24] while compliance with fundamental rights became part of the formal criteria for accession to the EU after Amsterdam.[25] A European Council meeting in 1999 marked a turning point; the Conclusions announced that:

> Protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy … There appears to be a need, at the present stage of the Union's development, to establish a Charter of fundamental

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[19] On how this came about, see G de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' (2011) 105(4) *AJIL* 649.
[20] See BVerfG, Judgment of 29 May 1974*,* 37 BvR 271 *(Solange I)*; BVerG, Judgment of 22 October 1986, 73 BvR 339 *(Solange II).*
[21] Case 11/70 *Internationale Handelsgesellschaft* EU:C:1970:114, para. 4. By this point the ECJ had already made brief mention of 'the fundamental rights enshrined in the general principles of Community law', see Case 29/69 *Stauder* EU:C:1969:57, para. 7.
[22] Case 4/73 *Nold v Commission* EU:C:1974:51, para. 13.
[23] *Nold v Commission* (n 22), para. 13.
[24] Now the updated Article 6 TEU.
[25] Now found in Article 49 TFEU which provides that 'Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union.'

> rights in order to make their overriding importance and relevance more visible to the Union's citizens.[26]

The Charter was first 'solemnly proclaimed' by the European Parliament, Council and Commission at Nice on 7 December 2000. With the entry into force of the Treaty of Lisbon in 2009, the Charter became legally binding.[27]

The mandate given to the Convention drafting the Charter expressly referred to the codification of existing fundamental rights protection by requiring 'the fundamental rights applicable at Union level [to] be consolidated in a Charter and thereby made more evident.'[28] In recognition of this codification aim, the Preamble to the Charter specifies that 'it is necessary to strengthen the protection of fundamental rights … by making those rights more visible in a Charter'[29] and refers to how the Charter 'reaffirms' fundamental rights 'as they result in particular, from the constitutional traditions and international obligations common to the Member States, the [ECHR], the Social Charters adopted by the Union and by the Council of Europe and the case-law of the [CJEU] and of the ECtHR.'[30] Significantly, the sources informing the development of Charter rights had previously been recognised as inspirational sources for the development of general principles.[31] Furthermore, the drafters of the Charter clearly intended to maintain continuity between the Charter and general principles since Articles 52(2)-(4) CFR tie the interpretation of the Charter to the inspirational sources of general principles (the ECHR and the constitutional traditions of the Member States) and to existing Treaty rights (as discussed in Chapter 4).

The resulting Charter is not identical to overlapping general principles. As O'Leary warns, '[a]ny codification exercise carries a risk … that the principles which it is sought

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[26] Presidency Conclusions of the Cologne European Council on June 4 1999.
[27] Article 6(1) TEU.
[28] Presidency Conclusions (n 26).
[29] Recital 4.
[30] Recital 5.
[31] See e.g. Case C-438/05 *Viking Line* EU:C:2007:772, paras 43-44; Case C-341/05 *Laval un Partneri* EU:C:2007:809*,* paras 90-91. The ECJ in *Viking Line* and *Laval* cited the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers to support the ECJ's conclusion that 'the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures'. On the 'special significance' of the ECHR as an inspirational source for the development of general principles, see e.g. Case C-260/89 *ERT* EU:C:1991:254, para. 41; Case C-94/00 *Roquette Frères SA*, para. 25; Case C-112/00 *Schmidberger* EU:C:2003:333, para. 71.

to codify may be altered or distorted'.[32] The Charter is no exception here. The text of the Charter makes manifest a tension between 'its conception as a constitutional instrument for polity building and its conception as a simple consolidation of the previous fundamental rights *acquis* aimed at guaranteeing regime legitimacy'.[33] The extensive list of rights in the Charter in many ways goes beyond those previously expressly recognised as general principles by the ECJ. Article 21(1) CFR is a prime example here as it includes several prohibited grounds of discrimination not yet expressly recognised as forming part of the general principles of EU law, such as colour, social origin, genetic features, language, political or any other opinion, membership of a national minority, property and birth.[34] However, the language of the Charter often suggests that its applicability is more limited than that of general principles. As a result, although there is a high degree of similarity between the overlapping sources of the prohibition on discrimination here, several *prima facie* differences emerge between the prohibition on status discrimination protected under the Charter and under the general principles of EU law. Discussion now turns to discuss these *prima facie* differences starting with apparent differences rendered insignificant in practice.

2.2. Differences Diminished by Interpretation

Several apparent differences in the applicability of the Charter and general principles did not manifest, specifically including those relating to: (1) the Charter's field of application; (2) the Charter's capacity for horizontal effects and (3) the territorial scope of the Charter.

The first possible divergence between the applicability of Article 21(1) CFR and corresponding general principles arose in relation to their respective fields of

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[32] S O'Leary, 'Free Movement of Persons and Services' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 499-545, 513.
[33] M Poaires Maduro, 'The Double Constitutional Life of the Charter of Fundamental Rights of the European Union' in T Hervey and J Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective* (Hart 2002) 269-99, 269.
[34] The ECJ did not explicitly refer to general principles prohibiting discrimination on grounds of race, age or sexual orientation until after the drafting of the Charter (although in cases either before it gained binding force or falling outside its temporal scope). Gualco describes this as an 'endogenous process' by which 'general principles are expressly discovered within the values and the rights protected by the Treaties themselves', see E Gualco, 'General Principles of EU Law as a *Passe-Partout* Key within the Constitutional Edifice of the European Union: Are the Benefits Worth the Side Effects?' (2016) Birmingham Law School Institute of European Law Working Paper No. 05, 2.

application. Initially, fundamental rights as general principles of EU law bound the EU institutions.[35] The ECJ later confirmed that EU fundamental rights as general principles bind the Member State when 'implementing'[36] EU law (e.g. where a Member State transposes a directive into national law) and when acting 'within the scope' of Union law.[37] Although the outer boundaries of what falls within the scope of application of EU law are difficult to define,[38] the concept expands to cover situations where a Member State derogates from EU law on the basis of express derogations[39] or mandatory requirements.[40]

The horizontal clause defining the Charter's field of application seems to adopt a narrower formulation than relied upon in ECJ case law. According to Article 51(1) CFR '[t]he provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States *only when they are implementing Union law*' (emphasis added). While *prima facie* confining the Charter to a more restrictive field of application,[41] the Explanations to the Charter – which are to be 'given due regard'[42] – clarify that 'it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is *only binding on the Member States when they act in the scope of Union law*'.[43] Interpreting Article 51(1) CFR broadly (and removing any concerns of divergence that the scope of application of that Charter differs from that of general principles) the ECJ in *Åkerberg Fransson* declared that the

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[35] *Internationale Handelsgesellschaft* (n 21).
[36] Case 5/88 *Wachauf* EU:C:1989:321, para. 19.
[37] E.g. *ERT* (n 31), para. 42; Case C-368/95 *Familiapress* EU:C:1997:325, para. 24.
[38] See e.g. AG Toth, 'Human Rights as General Principles of Law, in the Past and in the Future' in B Ulf and J Nergelius (eds), *General Principles of European Community Law: Reports from a Conference in Malmo, 27-28 August 1999* (Kluwer Law International 2000) 73-92, 84; Editorial Comments, 'The Scope of Application of the General Principles of Union Law: An Ever Expanding Union?' (2010) 47(6) *CMLRev* 1589; S Prechal, 'Competence Creep and General Principles of Law' (2010) 3 *Review of European Administrative Law* 5; S Prechal, S de Vries and H van Eijken, 'The Principle of Attributed Powers and the "Scope of EU Law"' in L Besselink, F Pennings and S Prechal (eds), *The Eclipse of the Legality Principle in the European Union* (Kluwer Law International 2011) 213-247; X Groussot, L Pech and GT Petursson, 'The Scope of Application of Fundamental Rights on Member States Action: In Search of Certainty in EU Adjudication' (2011) Eric Stein Working Paper No 1.
[39] *ERT* (n 31), paras 42-43.
[40] *Familiapress* (n 37), para. 24.
[41] On the drafting of Article 51(1) CFR, see G de Búrca, 'The Drafting of the European Charter of Fundamental Rights' (2001) 26(2) *ELRev* 126, 136.
[42] Article 52(7) CFR.
[43] Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/17, 32 (emphasis added).

'applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.'[44]

Precisely when the Charter binds the Member States remains somewhat contested[45] and is not helped by the inconsistent language employed by the ECJ when describing what falls within the concept of 'implementing' under the Charter. For instance, in *Hernández*, the Court referred to the need for:

> … a degree of connection between the measure of EU law and the national measure at issue which goes beyond the matters covered being closely related or one of those matters having an indirect impact on the other …[46]

Whereas in *Ymeraga,* the Court ruled that for the Charter to apply:

> … it must be ascertained among other things whether the national legislation at issue is intended to implement a provision of European Union law, what the character of that legislation is, and whether it pursues objectives other than those covered by European Union law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of European Union law on the matter or capable of affecting it.[47]

Despite the uncertainty over the precise field of application of the Charter, the ECJ does not approach the question as if it were distinct from the applicability of general principles. As such, Dougan considers that the situations in which the Charter and general principles apply 'can now be treated as (almost) interchangeable'.[48] In sum, no divergence seems to emerge here.

A second apparent divergence concerned the capacity for general principles prohibiting discrimination and Article 21(1) CFR to apply in disputes between private parties. It is well-established that the Charter and general principles are capable of vertical direct effect and so can be invoked in situations involving public authorities.[49] In the landmark

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[44] Case C-617/10 *Åkerberg Fransson* EU:C:2013:105, para. 21.
[45] On what constitutes 'implementing' under Article 51(1) CFR, see e.g. F Fontanelli, 'Implementation of EU Law through Domestic Measures after *Fransson*: The Court of Justice Buys Time and "Non-Preclusion" Troubles Loom Large' (2014) 39(5) *ELRev* 682; F Fontanelli, 'The Implementation of European Union Law by Member States under Article 51(1) of the Charter of Fundamental Rights' (2014) 20(3) *CJEL* 193; M Dougan, 'Judicial Review of Member State Action under the General Principles and the Charter: Defining the "Scope of Union Law"' (2015) 52(5) *CMLRev* 1201.
[46] Case C-198/13 *Julian Hernández and Others* EU:C:2014:2055, para. 34.
[47] Case C-87/12 *Ymeraga and Ymeraga-Tafarshiku* EU:C:2013:291, para. 41.
[48] Dougan 'Judicial Review of Member State Action under the General Principles and the Charter' (n 45) 1204.
[49] On general principles see e.g. e.g. *Klensch* (n 10), paras 8-13; Case 222/84 *Johnston* EU:C:1986:206, paras

Mangold ruling the ECJ confirmed individuals can rely on (at least) *some* general principles against private persons.[50] The wording of Article 51(1) CFR led scholars to argue that the Charter could apply horizontally since according to Article 51(1) CFR the Charter applies to the 'EU institutions and to the Member States' when they are implementing EU law, but does not mention private parties.[51]

Following the suggestion in *AMS*, albeit *obiter dicta*, that Article 21(1) CFR applies between private parties,[52] the ECJ confirmed in *Egenberger* that Article 21(1) CFR is invokable in disputes between private parties. The Court ruled that:

> The prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law.[53]

It then clarified that:

> As regards its mandatory effect, Article 21 of the Charter is no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on various grounds, even where the discrimination derives from contracts between individuals.[54]

13-21; Case C-442/00 *Rodríguez Caballero* EU:C:2002:752, paras 29-33. On Article 21(1) CFR see e.g. Case C-356/12 *Glatzel* EU:C:2014:350; Case C-528/13 *Léger* EU:C:2015:288.

[50] *Mangold* (n 4), para. 75ff. See also Case C-555/07 *Kücükdeveci* EU:C:2010:21, para. 50ff; Case C-441/14 *DI* EU:C:2016:278, paras 36-37. It is not clear whether all general principles prohibiting discrimination are, or should be, capable of horizontal application. In *Egenberger,* the ECJ held that '[t]he prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law [and] … is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law', see *Egenberger* (n 6) para. 76. However, it did not refer to other general principles. Tridimas has argued there is nothing to preclude *a priori* the horizontal effect of general principles, see T Tridimas, 'Horizontal Effect of General Principles: Bold Rulings and Fine Distinctions' in U Bernitz, X Groussot and F Schulyok (eds), *General Principles of EU Law and European Private Law* (Kluwer Law International 2013) 213-32, 214.

[51] See e.g. AW Heringa and L Verhey, 'The EU Charter: Text and Structure' (2001) 8(1) *MJ* 11, 21; Case C-282/10 *Dominguez* EU:C:2011:559, Opinion of AG Trstenjak, paras 80–83; LF Besselink, 'The Protection of Fundamental Rights post-Lisbon: The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions' (Report of 25th FIDE Congress 2012), 19; K Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8(3) *EuConst* 375, 377. For counter arguments, see e.g. C Ladenburger, 'Protection of Fundamental Rights Post-Lisbon – The Interaction between the Charter of Fundamental Rights, the European Convention of Human Rights and National Constitutions' (2012) Report of 25th FIDE Congress 34-35; P Craig and G de Búrca, *EU Law: Text, Cases, and Materials* (6th edn, OUP 2015) 196; E Frantziou, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality' (2015) 21(5) *ELJ* 657, 659.

[52] Case C-176/12 *Association de médiation sociale* EU:C:2014:2, para. 47.

[53] *Egenberger* (n 6), para. 76.

[54] *Egenberger* (n 6), para. 77.

It is again unlikely, therefore, that a divergence will emerge here between general principles and the Charter as regards their capacity to apply in horizontal disputes.

A final potential divergence suggested by the wording of the Lisbon Treaty concerned the territorial scope of the overlapping non-discrimination norms. Poland and the UK negotiated a Protocol – Protocol No 30 – which aimed to clarify the reach of the Charter within their domestic systems. According to Article 1(1) of the Protocol:

> The Charter does not extend the ability of the [CJEU], or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.[55]

Confirming the generally dismissive view of this so-called 'opt-out' in the academic literature,[56] the ECJ in *NS* held that 'Protocol (No 30) does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the recitals in the preamble to that protocol.'[57] Instead, Article 1(1) of the Protocol merely 'explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions.'[58] It is again unlikely that any divergence will emerge here and meaning that the territorial scope of both the Charter and general principles is the same 28 Member States.

2.3. Potential Divergences in the Protection from Discrimination

Where divergences do (potentially) emerge between the protection from discrimination under Article 21(1) CFR and general principles of EU law concerns: (1) the relevant framework for justifying discriminatory treatment and (2) the grounds of discrimination prohibited.

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[55] Article 1(2) applies only to the rights in Title IV of the Charter and so does not apply to Article 21(1) CFR.

[56] E.g. P Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (OUP 2011) 238-40; RC White, 'A New Era for Human Rights in the European Union?' (2011) 30(1) *YEL* 100, 111; D Anderson and CC Murphy, 'The Charter of Fundamental Rights' in A Biondi, P Eeckhout and S Ripley (eds), *EU law after Lisbon* (OUP 2012) 155-179, 166-69.

[57] Joined Cases C-411/10 and C-493/10 *NS* EU:C:2011:865, para. 119.

[58] *NS* (n 57), para. 120. See further S Peers, 'The 'Opt-Out' That Fell to Earth: The British and Polish Protocol Concerning the EU Charter of Fundamental Rights' (2012) 12(2) *Human Rights Law Review* 375.

First, a divergence potentially emerges as regards the 'limits on limits' to Article 21(1) CFR and general principles prohibiting discrimination. In pre-Charter case law, the ECJ does not discuss permissible limits on general principles prohibiting discrimination *per se*.[59] Instead the ECJ refers to the general principles alongside discussion of express derogations in secondary Union law. According to Directives 2000/43, 2000/78, 2004/113 and 2006/54, a measure is not indirectly discriminatory where it is 'objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary';[60] specific grounds of justification are also found in secondary Union law relating to genuine occupational requirements, religious institutions, age and public safety.[61] No case exists in which the ECJ strikes down any of these derogations as incompatible with general principles. Indeed, when interpreting Article 6(2) of Directive 2000/78 on age-related derogations,[62] the ECJ held that the:

> … directive gives specific expression, in the field of employment and occupation, to the principle of non-discrimination on grounds of age, which is regarded as being a general principle of European Union law … Since Article 6(2) of Directive 2000/78 allows Member States to provide for an exception to the principle of non-discrimination on grounds of age, that provision must be interpreted restrictively.[63]

The conclusion is thus that the justification framework under general principles prohibiting discrimination does not differ from that under the non-discrimination directives.

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[59] The precise test for limiting fundamental rights protected as general principles is somewhat unclear, making it difficult to assess whether Article 52(1) CFR introduces a more or less stringent test. See e.g. Case C-227/04 P *Lindorfer v Council* EU:C:2006:748, Opinion of AG Sharpston para. 62; S Peers, 'Taking Rights Away? Limitations and Derogations' in S Peers and A Ward (eds), *The European Union Charter of Fundamental Rights* (Hart 2004) 141-180, 151; Craig, *The Lisbon Treaty* (n 56) 221.

[60] Directive 2000/43, Article 2(2)(b); Directive 2000/78, Article 2(2)(b); Directive 2004/113, Article 2(b); Directive 2006/54, Article 2(1)(b).

[61] Limitations meeting 'genuine occupational requirements' are permitted under: Directive 2000/43, Article 4; Directive 2000/78, Article 4(1); Directive 2006/54, Article 14(2). For permitted limitations on equal treatment relating to religious institutions, see Directive 2000/78, Article 4(2). For age-related limitations on equal treatment, see Directive 2000/78, Article 6. On the protection of public safety, see Directive 2000/78, Article 2(5).

[62] According to Article 6(2), 'Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.'

[63] Case C-476/11 *HK Danmark* EU:C:2013:590, paras 45-46. See also, e.g. Joined Cases C-297/10 and C-298/10 *Hennigs and Mai* EU:C:2011:560, paras 53-78; Case C-447/09 *Prigge and Others* EU:C:2011:573, para. 37ff.

The permissibility of limiting rights protected under the Charter is set out in Article 52(1) CFR:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

As introduced in Chapter 3, in one sense, the Charter might offer lesser protection here since limits to directly discriminatory measures are potentially justifiable under Article 52(1) CFR. In another sense, the threshold for justifying differential treatment under the Charter potentially differs from that under overlapping general principles by introducing the additional requirements that any limits are 'provided for by law and respect the essence of those rights and freedoms'.

A second divergence potentially emerges between Article 21(1) CFR and overlapping general principles regarding the grounds of discrimination prohibited. Strictly speaking, EU law recognises general principles prohibiting discrimination on grounds of sex, age, race and ethnic origin, religion and sexual orientation. The express list in Article 21(1) CFR additionally prohibits discrimination on grounds of colour, social origin, genetic features, language, political or any other opinion, membership of a national minority, property and birth. What is more, the grounds listed in Article 21(1) CFR are only indicative, the provision expressly prohibiting '[a]ny discrimination based on any ground *such as*…'. *Prima facie* the Charter prohibits further grounds of discrimination; what complicates matters here is the ambiguity over whether there is simply one general principle of equal treatment or several general principles prohibiting status discrimination on particular grounds.[64] If reference to a general principle prohibiting discrimination on a particular ground is simply understood as a specific manifestation of the general principle of equality then it may be that a divergence does not arise here.

[64] L Woods and P Watson, *Steiner & Woods EU Law* (12th edn, OUP 2014) 169. Indeed, several Advocates General have argued against the recognition of specific general principles, see e.g. Case C-227/04 P *Lindorfer v Council* EU:C:2006:748, Opinion of AG Sharpston paras 52-58; Case C-411/05 *Palacios de la Villa v Cortefiel Servicios SA* EU:C:2007:106, Opinion of AG Mazák, paras 87-97; Case C-267/06 *Maruko* EU:C:2007:486, Opinion of AG Ruiz-Jarabo Colomer, fn 82; Case C-427/06 *Bartsch* EU:C:2008:297, Opinion of AG Sharpston, paras 34-65. There is no need to resolve this question here: either there is a general principle prohibiting discrimination on each of the grounds listed in Article 21(1) CFR or each ground would surely be covered by a principle of equality *tout court*.

Crucially, it may also leave scope for the recognition of further general principles prohibiting discrimination on grounds beyond those prohibited by the Charter. This point is picked up again below when considering whether the ECJ recognises new general principles prohibiting discrimination on a specific ground.

Overall, very few divergences should emerge in practice between Article 21(1) CFR and overlapping general principles and there is little scope in practice for general principles to have added value. This high degree of similarity makes sense when one considers that aim of the Charter was to consolidate existing fundamental rights protection and how the horizontal clauses in the Charter (specifically, Articles 52(3) and 52(4) CFR) require the interpretation of the Charter as 'the same' or 'harmoniously' with the inspirational sources of general principles: the ECHR and constitutional traditions common to the Member States. Two distinct divergences do potentially arise, however. The first difference relates to the *level* of protection; i.e. where discrimination is alleged on a ground prohibited under both Article 21(1) CFR and a general principle, an applicant may benefit from greater protection by relying on the general principle. The second difference relates to the grounds of discrimination prohibited, which may also be more extensive under general principles.

3. IDENTIFYING A STARTING POINT

3.1. Possible Priority Clauses

When an overlap occurs between general principles of Union law and the Charter, it is not obvious which of the existing legal tools and principles discussed in Chapter 2 could guide the ECJ. Neither the Treaties nor the Charter expressly define the relationship between competing sources of EU fundamental rights. However, since any priority clause would take precedence over an applicable priority principle, this Section starts by assessing whether any of the horizontal provisions in the Charter (specifically Articles 52(2), 52(4) and 53 CFR) and/or Article 6 TEU offer any guidance to the ECJ here. The conclusion reached is that only Article 6(3) TEU offers any guidance regarding the continuing role of general principles of EU law now codified in the Charter.

Let us begin by considering the potential utility of Article 52(2) CFR, according to which '[r]ights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.'[65] If one focuses on the fact that general principles find their origins in the Treaties[66] and are set out in Article 6(3) TEU as one of the sources of EU fundamental rights, it is possible to include general principles within the reference to 'the Treaties'.[67] Interpreting Article 52(2) CFR as a priority clause would mean that where a Charter right corresponds with a general principle, that 'Charter right is subject to the limitations established by the Treaties for the general principle'.[68]

The difficulties with any attempt to extend Article 52(2) CFR to general principles are twofold. First, as Chapters 3 and 4 also concluded, the Explanations to Article 52(2) CFR strongly suggest that this provision only applies to rights in the Charter that *explicitly* find their origins in the Treaty; the Explanations clarify that 'rights which were already expressly guaranteed in the Treaty establishing the European Community and have been recognised in the Charter, and which are now found in the Treaties (notably the rights derived from Union citizenship)'.[69] Secondly, as Peers and Prechal argue, if Article 52(2) CFR intended to link the Charter expressly to general principles, this would render the other provisions of Article 52 CFR unnecessary;[70] the codification nature of the Charter which 'according to its preamble, seeks to "reaffirm" the rights set out in the same sources as the general principles and make them "more visible" … would turn the specific provision of Article 52(2) into the general rule.'[71] Article 52(2) CFR does

[65] For discussion of Article 52(2) CFR in the context of an overlap between the Treaties and the Charter, see Chapter 4, Section 3.
[66] The ECJ cites Article 19(1) TEU – specifying that the ECJ 'shall ensure that in the interpretation and application of the Treaties the law is observed' – as authority for the development of general principles, see Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur* EU:C:1996:79, para. 27. Scholars also refer to Article 263(2) TFEU as authority for the development of general principles since it refers 'the Treaties *or of any rule of law relating to their application'* (emphasis added), see e.g. T Hartley, *The Foundations of European Union Law* (8th edn, OUP 2014) 146.
[67] S Peers and S Prechal, 'Scope and Interpretation of Rights and Principles' in S Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 1455-1522, para. 52.93.
[68] R Schütze, 'Three "Bills of Rights" for the European Union' (2011) 30(1) *YEL* 131, 149.
[69] Explanations (n 43) 33.
[70] Peers and Prechal (n 67), para. 52.96.
[71] Peers and Prechal (n 67), para. 52.96.

not, therefore, appear to offer any guidance to the ECJ on the inter-relationship between Article 21(1) CFR and overlapping general principles.[72]

Turning now to assess whether Article 52(4) CFR might offer any guidance here. According to Article 52(4) CFR, '[i]n so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.' Thus, that provision links the interpretation of the Charter to common constitutional traditions, which form one of the inspirational sources of general principles.[73] It would, however, be a logical jump too far to interpret Article 52(4) CFR as tying the interpretation of Charter rights to the corresponding general principles.

Article 52(4) CFR recognises the role played by national constitutional traditions in shaping fundamental rights protection in the EU and the need for the Charter to keep pace with evolving national conceptions of fundamental rights. The Explanations to the Charter clarify this point by referring to the ECJ's decision in *Hauer*[74] (in which the ECJ examined the right to property in different Member States) and noting that:

> … rather than following a rigid approach of "a lowest common denominator", the Charter rights concerned should be interpreted in a way offering a high standard of protection which is adequate for the law of the Union and in harmony with the common constitutional traditions.[75]

Even if one can stretch the meaning of Article 52(4) CFR to include an indirect reference to general principles, that provision only refers to the need for 'harmonious' interpretation. To interpret the Charter in harmony with overlapping general principles is a qualitatively different obligation from that included in Articles 52(2) and 52(3) CFR: the former referring to the exercise of Charter rights 'under the conditions and within the limits defined by' the Treaties and the latter stating that where Charter rights are also protected in the ECHR 'the meaning and scope of those rights shall be [at least] the

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[72] For discussion of the role of Article 52(2) CFR when there is an equivalent Treaty provision, see Chapter 4, Section 3.
[73] Article 6(3) TEU. The ECJ has explicitly recognised such traditions as inspiring the general principles prohibiting discrimination on grounds of age and sexual orientation *Mangold* (n 4), para. 74; *Römer* (n 7), para. 59. This probably extends to other grounds as Recital 1 of both the Framework Directive and the Race Directive refers to common constitutional traditions.
[74] Case 44/79 *Hauer* EU:C:1979:290.
[75] Explanations (n 43) 34.

same'. Harmonious interpretation, as the Explanations clarify, instead refers to an interpretation which is congruous with protection across the EU.

A third possible priority clause is Article 53 CFR, which specifies that '[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law'. One could read Article 53 CFR as guiding the ECJ to apply whichever source of the prohibition on status discrimination offers the greatest protection to the individual. Consider the possibility, as noted above, of directly discriminatory measures that are capable of justification under the Charter but not under general principles. On this reading of Article 53 CFR, the ECJ should apply the general principle here; otherwise, the result would be a reduction in human rights protection and a 'restriction' of general principles.

However, this reading of Article 53 CFR is not persuasive. According to the Explanations to the Charter, Article 53 CFR aims to 'maintain the level of protection currently afforded within their respective scope by Union law, national law and international law'.[76] No mention is made of a continuing system of protection under the general principles. According to Bering Liisberg, the main concern during the drafting of Article 53 CFR was to secure the minimum status of the ECHR and the phrase 'in their respective fields of application' never intended to refer to the applicability of general principles.[77] Instead, it aimed to clarify 'that national constitutions could only prevail in the (limited) sphere of exclusive national competence.'[78] Article 53 CFR thus also does not appear to offer any guidance to the ECJ on the inter-relationship between the Charter and overlapping general principles.

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[76] Explanations (n 43) 35.

[77] J Bering Liisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: a fountain of law or just an inkblot?' (2001) Jean Monnet Working Paper No 4, 11-22. As de Boer notes, Article 53 CFR 'resembles closely Article 53 of the ECHR, which lays down that the ECHR is a minimum rights-standard above which the contracting parties are free to retain a higher rights protection', see N de Boer, 'Addressing rights divergences under the Charter: *Melloni*' (2013) 50(4) *CMLRev* 1083, 1092. See also L Besselink, 'The Member States, the National Constitutions and the Scope of the Charter' (2001) 8 *MJ* 68, 73; B de Witte, 'Level of Protection' in S Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 1523–1538, para. 53.07.

[78] Bering Liisberg (n 77) 15. An interpretation that was borne out in practice in Case C-399/11 *Melloni* EU:C:2013:107. See also, de Boer (n 77) 1093.

Discussion now turns to assess whether Article 6(3) TEU, which affirms the continued existence of general principles as a source of fundamental rights, offers any interpretative guidance to the ECJ on the continuing role of the general principles prohibiting status discrimination. Hofmann and Mihaescu argue that Article 6 TEU evidences 'the intention of the constitutional legislator to confer on the EU courts the power to act as the arbiter between the different and – on occasion – competing or overlapping sources of fundamental rights'.[79] In their view, under Article 6(3) TEU:

> … overlapping sources of fundamental rights … require comparison and balancing, with the objective of maximisation of their respective scopes of applicability … all different possible sources of fundamental rights and fundamental freedoms in the EU have to be taken into account in such a balancing exercise designed to maximise the possible applicability of each single right.[80]

This implies a maximalist reading of Article 6(3) TEU akin to that discussed above in relation to Article 53 CFR. Construing the potential guidance offered by Article 6(3) TEU slightly differently, Iglesias Sánchez suggests that if the ECJ interpreted Article 51(1) CFR (on the field of application) narrowly, general principles might apply residually in areas not covered by the Charter.[81] On this view, Article 6(3) TEU is akin to a 'shall not affect' or a 'without prejudice' clause.

The drafting history of Article 6(3) TEU suggests a more limited reading. Motivating the inclusion of Article 6(3) TEU in the Treaties was the need to reaffirm the possible development of *additional* general principles.[82] Ladenburger – an EU official involved in the drafting of the Charter – notes how:

> … there had been a debate on whether it was appropriate still to keep, after full incorporation of the Charter into primary law, an express provision referring to fundamental rights as general principles of law. The view prevailed that such an

[79] Hofmann and Mihaescu (n 2) 81.
[80] Hofmann and Mihaescu (n 2) 81.
[81] S Iglesias Sánchez, 'The Court and the Charter: the Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights' (2012) 49(5) *CMLRev* 1565, 1597. See also C Grabenwarter and K Pabel, 'Article 6 [Fundamental Rights – The Charter and the ECHR]' in HJ Blanke and S Mangiameli (eds), *The Treaty on European Union (TEU): A Commentary* (Springer 2013) 287-348.
[82] This approach is supported by e.g. D Anderson and CC Murphy, 'The Charter of Fundamental Rights: History and Prospects in Post-Lisbon Europe' (2011) EUI Working Paper LAW No. 08, 7; Besselink 'The Protection of Fundamental Rights post-Lisbon' (n 51) 13; T Tridimas, 'Fundamental rights, general principles of EU law, and the Charter' (2014) 16 *CYELS* 361, 377.

> article would indeed be useful to clarify that the Court remains free to identify further fundamental rights not enshrined in the Charter.[83]

Supporting Ladenburger's point, the *travaux préparatoires* of the Draft Constitutional Treaty state that the equivalent of Article 6(3) TEU aims:[84]

> … to make clear that incorporation of the Charter does not prevent the Court of Justice from [recognising] additional fundamental rights which might emerge from any future developments in the ECHR and common constitutional traditions. That is in line with classic constitutional doctrine which never interprets the catalogues of fundamental rights in constitutions as being exhaustive, thus permitting the development, through case-law, of additional rights as society changes.[85]

Article 6(3) TEU thus offers little guidance regarding the continuing role of general principles in the context of an overlap with Article 21(1) CFR. It cannot tell us, for example, which norm should be the starting point of the ECJ's analysis or which norm should prevail in the event of conflict. The provision only reaffirms the possibility of recognising additional general principles where it is not possible to interpret the Charter in line with evolving fundamental rights protection in the Member States and in international treaties.[86] This could include additional general principles prohibiting status discrimination, although it is difficult to foresee when this might be necessary given the non-exhaustive list of prohibited grounds in Article 21(1) CFR.

Given the limited relevance of Article 6(3) TEU here, discussion now turns to the potential relevance of the classical priority principles (*lex superior*, *lex specialis* and *lex posterior*) that accord priority between norms based on rank, specificity and date respectively.

3.2. Priority Principles

Prima facie it is not clear which priority principle overlaps between the Charter and general principles engage. There is no easy answer to the question of whether Article

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[83] Ladenburger (n 51) 4.
[84] Draft Treaty establishing a Constitution for Europe [2003] OJ C 169/1. For the final agreed text see, Treaty establishing a Constitution for Europe [2004] OJ C 310/3.
[85] European Convention, 'Commentary on Arts 1-16 of the Preliminary Draft Constitutional Treaty' CONV 528/03, 13. Grabenwarter and Pabel argue that this interpretation 'as suggested in the Explanatory Note would entail the eminent danger that the ECJ deduces new fundamental rights from the common constitutional traditions of the MS whenever the court finds the scope of a right derived from the EUCFR to be too narrow. This would undermine the EUCFR and the competence to amend the EUCFR in accordance with Article 48 TEU', see Grabenwarter and Pabel (n 81) para. 88.
[86] Besselink 'The Protection of Fundamental Rights post-Lisbon' (n 51) 13.

21(1) CFR or overlapping general principles constitute the applicable norm that is higher-ranking, more specific or later in time. The unwritten status of general principles 'makes it questionable, if they can be defined, labelled and categorized as if they were written norms with a clear status in norm hierarchy.'[87] The possibility to invoke general principles to review the legality of secondary Union law means they have a 'a status of higher law',[88] however, it does not necessarily follow that general principles are of equal ranking with the Treaties. No consensus exists in the academic literature concerning the position of general principles in the hierarchy of norms. A survey of existing scholarship shows competing viewpoints over whether general principles have the same hierarchical status as the Treaties and the Charter,[89] are superior even to the constitutive Treaties[90] or fall below the Treaties forming the 'second tier of the hierarchy of norms'.[91] The development of general principles via judicial elaboration means it is also difficult to assess their specialty and the date on which they come into being. Their content is inevitably contentious[92] and it is unclear if general principles 'pre-exist' their explicit recognition by the ECJ or if they 'become valid law by (gradual) judicial or legislative recognition'.[93]

Looking to the rationale underpinning the different priority principles, though, quite quickly discounts the utility of the *lex specialis* and *lex posterior* principles (even if a more

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[87] J Raitio, *The Principle of Legal Certainty in EC Law* (Springer 2003) 117.

[88] B de Witte, 'Institutional Principles: A Special Category of General Principles of EC Law' in B Ulf and J Nergelius (eds), *General Principles of European Community Law: Reports from a Conference in Malmo, 27-28 August 1999* (Kluwer Law International 2000) 143-59, 143. On the use of general principles to review EU acts see e.g. Case 114/76 *Bela-Mühle* EU:C:1977:96, paras 5-8; Case 122/78 *Buitoni* EU:C:1979:43, para. 16ff; Case 224/82 *Meiko-Konservenfabrik* EU:C:1983:219, para. 11ff; Case C-309/89 *Codorniu v Council* EU:C:1994:197, para. 26ff; Joined Cases C-402/05 P and C-415/05 P *Kadi v Council and Commission* EU:C:2008:461, paras 283-327.

[89] See e.g. S Koukoulis-Spiliotopoulos, 'Amended Equal Treatment Directive (2002/73): An Expression of Constitutional Principles/Fundamental Rights' (2005) 12(4) *MJ* 327, 331; T Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006) 51; *Audiolux*, Opinion of AG Trstenjak (n 11), para. 70; K Lenaerts and others, *European Union law* (3rd edn, Sweet & Maxwell/Thomson Reuters 2011); A Rosas and L Armati, *EU Constitutional Law: An Introduction* (2 edn, Hart 2012) 56.

[90] Toth (n 38) 78. This is as an outlying position within the edited collection, though, see K Lenaerts and M Desomer, 'General Principles of European Community Law' (2002) 39(4) *CMLRev* 904, 905.

[91] B de Witte, 'Legal Instruments and Law-Making in the Lisbon Treaty' in S Griller and J Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Springer 2008) 79-108, 79; Craig and de Búrca, 111.

[92] M Bell, 'The Principle of Equal Treatment: Widening and Deepening' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 611-639, 628.

[93] C Semmelmann, 'General Principles in EU Law between a Compensatory Role and an Intrinsic Value' (2013) 19(4) *ELJ* 458, 464. See also, N Walker, 'The Philosophy of European Union Law' in A Arnull and D Chalmers (eds), *The Oxford Handbook of EU Law* (OUP 2015) 17-19.

specific or later norm *could* be identified). It will be recalled from Chapter 2 that the principles of *lex specialis* and *lex posterior* both aim to secure the intentions of the legislature. When applying the more recent norm, the idea is that the legislature is aware of the earlier law and intends to overrule it.[94] In relation to the more specific norm the assumption is that a lawmaker, 'in regulating a specific area, wants to create special rules that trump the general rules in the field.'[95] The criteria of specialty and date may, however, actually contradict the intentions of those responsible for drafting the Charter if relied upon to structure its relationship to overlapping general principles. The express aim of the Charter was to 'strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments *by making those rights more visible in a Charter*' (emphasis added).[96] If Article 21(1) CFR is not always the *lex specialis* or the *lex posterior*, this would 'ignore the clear will of the Treaty drafters to furnish the Union with a written bill of rights, intended to act as the primary repository of fundamental rights protection, and capable of having direct legal effects of its own'.[97]

In contrast, recognising the Charter as a *lex superior* fits with the underlying rationales of that principle. The principle of *lex superior* allows states to entrench certain fundamental principles and aims to ensure that the norm with the greatest democratic legitimacy prevails[98] (assuming that, as an organising principle, hierarchy ranks 'legal acts in accordance with the democratic legitimacy of their respective authors and adoption procedures'[99]). On this view, the Charter should take precedence over overlapping general principles. The Convention assembled to draft the Charter included representatives of Member State governments and national Parliaments, a member of

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94 ILC, 'Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*' (13 April 2006) UN Doc A/CN.4/L.682 ('Fragmentation Report'), para. 226.
95 R Michaels and J Pauwelyn, 'Conflict of Norms or Conflict of Laws: Different Techniques in the Fragmentation of Public International Law' (2011-2012) 22(3) *Duke Journal of Comparative & International Law* 349, 354. See also, J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (CUP 2003) 388; A Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*' (2005) 74(1) *NJIL* 27, 42.
96 Preamble, Recital 4. See also, M Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts' (2008) 45(3) *CMLRev* 617, 664; Tridimas, 'Fundamental rights, general principles of EU law, and the Charter' (n 82) 377.
97 Dougan, 'The Treaty of Lisbon 2007' (n 96) 664.
98 R Bieber and I Salome, 'Hierarchy of norms in European Law' (1996) 33(5) *CMLRev* 907, 910.
99 K Lenaerts and M Desomer, 'Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures' (2005) 11(6) *ELJ* 744, 745.

the Commission, members of the European Parliament and held public meetings in which individuals and NGOs were invited to comment.[100] Each of Member then had to ratify the Lisbon Treaty (and with it the Charter) before it entered into force. In contrast general principles are judicially recognised principles whose status as higher law stems from the fact that 'their origins lie in the… Treaty'[101] and from the normative import of the principles they embody.[102] Neither seems sufficient to elevate general principles to the same level as the Treaties; the Treaties provide the overall justification for their existence and, once codified, the argument from normativity fades away. Further downgrading the status of general principles in relation to the Charter, the methodology and the threshold for recognition as a general principle of Union law remains unclear.[103] For example, when the ECJ recognised a general principle of non-discrimination on grounds of age in *Mangold*, only two of the (then) 25 Member States (Finland and Portugal) referred to the principle in their constitutions and the principle is not found among the rights of the ECHR.[104] These differences between general principles and written primary law in terms of their democratic legitimacy support the idea that the Charter is a *lex superior*.

The application of the *lex superior* principle in the context of an overlap between Article 21(1) CFR and general principles prohibiting status discrimination differs from the application of the principle in the context of an overlap between primary and secondary Union law, as considered in Chapter 3. There is no need, for example, for the lower-ranking norm (i.e. general principles) to be the starting point of ECJ's analysis: general principles do not aim to implement the Charter nor does the Charter act as a check on

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100 P Craig, *EU Administrative Law* (OUP 2012) 494.
101 Tridimas, *General Principles of EU Law* (n 89) 51.
102 Tridimas, *General Principles of EU Law* (n 89) 51; *Audiolux*, Opinion of AG Trstenjak (n 11), para. 70. Although the process of discerning which principles are fundamental has been accused of lacking rigour, see e.g. M Herdegen, 'The Origins and Development of General Principles of Community Law' in B Ulf and J Nergelius (eds), *General Principles of European Community Law: Reports from a Conference in Malmo, 27-28 August 1999* (Kluwer Law International 2000) 3-23, 17-21; M Herdegen, 'General Principles of EU Law: the Methodological Challenge' in U Bernitz, J Nergelius and C Cardner (eds), *General principles of EC law in a Process of Development: Reports from a Conference in Stockholm, 23-24 March 2007* (Kluwer Law International 2008) 343-355, 346; J Bengoetxea, 'General principles of EC law: The wider European law and jurisprudence debate' (2008) 45(4) *CMLRev* 1279, 1280.
103 Herdegen, 'General Principles of EU Law' (n 102) 346. Some general principles appear to lack support in both international treaties and the constitutional traditions common to the Member States.
104 See M Dougan, 'In Defence of *Mangold*?' in A Arnull and others (eds), *A Constitutional Order of States? Essays in EU law in honour of Alan Dashwood* (Hart 2011) 220-21 and references cited therein.

the legality of general principles.[105] The ECJ should instead begin its analysis directly with the Charter rather than with the overlapping general principle.

Understanding the Charter as a *lex superior* here militates against the application of general principles as an additional layer of scrutiny or a 'safety valve'[106] i.e. if the general principles offered more extensive protection from discrimination. Applying the overlapping general principle residually would enable a hierarchically inferior norm to bypass 'the limits negotiated and agreed upon by the Union institutions and the Member States.'[107] It is less clear whether understanding the Charter as a *lex superior* would militate against the recognition of additional general principles prohibiting status discrimination. The *lex superior* notion and Article 6(3) TEU are to some extent in tension here. Given the express authority in the Treaties for the development of new general principles, it is suggested that the development of further general principles prohibiting status discrimination should remain a possibility. However, recourse to general principles should only follow an attempt to bring any developing general principles prohibiting discrimination under the rubric of Article 21(1) CFR.

When faced with an overlap between Article 21(1) CFR and general principles of Union law, the principle of *lex superior* suggests that the Charter should be the only applicable source of the prohibition status discrimination. This is unless further prohibited grounds of discrimination develop in Member State law and in international human rights norms that cannot be brought under Article 21(1) CFR (although it is very difficult to envisage this possibility). This does not, however, dismiss the relevance of existing (pre-Charter) case law on the general principles prohibiting status discrimination for determining the standard of protection under the Charter. In light of its codification aim, the Charter should capture the level of fundamental rights protection that existed under general principles. Existing case law on the scope and interpretation of overlapping general principles should, therefore, remain relevant for

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[105] On this point, see Chapter 2, Section 3.3.1 and Chapter 3, Section 2.3.
[106] Gualco 'General Principles of EU Law as a *Passe-Partout* Key' (n 34) 3-4. Several scholars have advocated for general principles to be applied residually where they may offer additional protections. See e.g. LS Rossi, 'How Fundamental are Fundamental Principles? Primacy and Fundamental Rights after Lisbon' (2008) 27(1) *YEL* 65, 79; S Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11(4) *Human Rights Law Review* 645, 671; Iglesias Sánchez (n 81) 1597; Hofmann and Mihaescu (n 2) 74 fn 3.
[107] Dougan, 'The Treaty of Lisbon 2007' (n 96) 664.

determining the meaning of the Charter. Neither does this argument preclude a role for the methodology of 'discovering' general principles (as essentially mandated by Articles 52(3) and 52(4) CFR) in the identification of new status discrimination grounds in the future, which can then be formally accommodated by the 'such as' wording of Article 21(1) CFR. Discussion now turns to assess whether the ECJ adopts this approach in practice.

4. ECJ PRACTICE CONSISTENT WITH THE PRINCIPLE OF LEX SUPERIOR

This Section compares ECJ practice against the baseline established above. The focus here is on how the ECJ approaches the inter-relationship between the Charter and overlapping general principles when an applicant alleges discrimination on one of the grounds listed in Article 21(1) CFR (the continued recognition of general principles prohibiting discrimination is discussed further below). The major finding is that ECJ practice coheres with the understanding of the *lex superior* principle as outlined above: only Article 21(1) CFR applies, although the ECJ still draws upon earlier case law to inform the standard of protection under that right.

Overlaps between Article 21(1) CFR and general principles prohibiting discrimination arose in thirty-three cases.[108] Twenty-seven of these cases did not raise any questions about the inter-relationship between the Charter and overlapping general principles since the situation either fell outside the scope of EU law[109] or could be resolved on the

[108] Overlaps were identified by searching the curia.eu database. Searches were carried out, first, by legal provision or act (i.e. Article 21(1) CFR and the non-discrimination directives) and, second, for the following keyword 'principle of non-discrimination'; 'principle of equal treatment'; and 'prohibition on discrimination'. The analysis presented in this Chapter is limited to cases falling within the temporal scope of the Charter. Admittedly, the ECJ does sometimes apply the Charter in cases falling outside its temporal scope. In *Paoletti*, for example, the ECJ held that the fact that the 'acts in the main proceedings took place during 2004 and 2005, that is to say before the entry into force of the Treaty of Lisbon on 1 December 2009… does not preclude the application, in the present case, of Article 49(1) [CFR (the principle of legality)]' (para. 26). The ECJ justified its decision on the grounds that, '[e]ven before the entry into force of the Treaty of Lisbon… the Court held that [the principle of legality] followed from the constitutional traditions common to the Member States and, therefore, had to be regarded as forming part of the general principles of EU law, which national courts must respect when applying national law' (para. 25). See, Case C-218/15 *Paoletti and Others* EU:C:2016:748. Cases falling outside the temporal scope of the Charter are not considered here because: (1) general principles prohibiting discrimination do not have the same longevity as the principle of legality; (2) the ECJ has not made a similar declaration in relation to Article 21(1) CFR; and (3) following the ECJ's approach in *Paoletti* would involve the complicated task of identifying precisely when each general principle prohibiting discrimination on a particular ground gained binding force.

[109] Case C-122/15 *C* EU:C:2016:391, paras 27-29.

basis of the relevant non-discrimination directive. Similar to the pattern identified in Chapter 3, the ECJ does not apply the Charter following a determination on the basis of secondary Union law that the contested national measure: (1) fell within an express derogation;[110] (2) amounted to discrimination;[111] or (2) complied with the relevant non-discrimination directive.[112] The ECJ also did not have recourse to the Charter when asked to expand on the interpretation of secondary Union law.[113]

The cases most relevant for present purposes, and to which discussion now turns, are six cases involving either a reference concerning the validity of secondary Union law or a situation falling outside the scope of the non-discrimination directives. In none of these cases does the ECJ articulate what principle of interpretation guides the inter-relationship between Article 21(1) CFR and overlapping general principles prohibiting status discrimination.[114] However, on close inspection, the ECJ's approach is consistent with the principle of *lex superior* as outlined above in all bar one of these cases i.e. where discrimination is alleged on a ground prohibited by Article 21(1) CFR, that provision alone determines the outcome.

In cases involving judicial review of secondary Union law, the ECJ relies on the Charter as the primary reference point and not the overlapping general principle. In *Test-Achats, Glatzel* and *Fries,* the ECJ relies on the Charter as the applicable yardstick for assessing

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110 Case C-152/11 *Odar* EU:C:2012:772, para. 54; Case C-529/13 *Felber* EU:C:2015:20, para. 40; Case C-515/13 *Ingeniørforeningen i Danmark* EU:C:2015:115, para. 45; Case C-258/15 *Salaberria Sorondo* EU:C:2016:873, para. 50; Case C-443/15 *Parris* EU:C:2016:897, para. 78; Case C-143/16 *Abercrombie & Fitch Italia* EU:C:2017:566, para. 47.

111 Case C-286/12 *Commission v Hungary* EU:C:2012:687, para. 81; Case C-595/12 *Napoli* EU:C:2014:128, para. 39; Case C-530/13 *Schmitzer* EU:C:2014:2359, para. 45; Case C-416/13 *Vital Pérez* EU:C:2014:2371, para. 74; Case C-417/13 *Starjakob* EU:C:2015:38, para. 40; Case C-222/14 *Maïstrellis* EU:C:2015:473, para. 52; Case C-20/13 *Unland* EU:C:2015:561, para. 36; Case C-270/16 *Ruiz Conejero* EU:C:2018:17, para. 57.

112 Case C-132/11 *Tyrolean Airways Tiroler Luftfahrt* EU:C:2012:329, para. 31; Case C-432/14 *O* EU:C:2015:643, para. 39; Case C-137/15 *Plaza Bravo* EU:C:2015:771, para. 30; Case C-539/15 *Bowman* EU:C:2016:977, para. 33; Case C-354/16 *Kleinsteuber* EU:C:2017:539, para. 68; Case C-46/17 *John* EU:C:2018:131, para. 32; Case C-482/16 *Stollwitzer* EU:C:2018:180, para. 47.

113 *FOA* (n 8), para. 42ff; Case C-363/12 *Z* EU:C:2014:159, paras 46, 68; Case C-395/15 *Daouidi* EU:C:2016:917, para. 42; Case C-668/15 *Jyske Finans* EU:C:2017:278, para. 14; Case C-451/16 *MB* EU:C:2018:492, para. 26ff.

114 The ECJ has not offered any clarification in cases outside the non-discrimination context either. The referring court in *Iida*, asked whether 'the "unwritten" fundamental rights of the European Union developed in the Court's case-law… [can] be applied in full even if the Charter is not applicable in the specific case; in other words, do the fundamental rights which continue to apply as general principles of Union law under Article 6(3) TEU stand autonomously and independently alongside the new fundamental rights laid down in the Charter in accordance with Article 6(1) TEU?' The ECJ did not, however, offer a substantive reply to this question, see Case C-40/11 *Iida* EU:C:2012:691, para. 32.

the legality of secondary Union law. In *Test-Achats*, the ECJ held that 'since recital 4 to Directive 2004/113 expressly refers to Articles 21 and 23 of the Charter, the validity of Article 5(2) of that directive must be assessed in the light of those provisions'.[115] In *Glatzel,* the ECJ was clear that '[i]t must be determined whether the EU rules at issue in the main proceedings [are] contrary to Article 21(1) of the Charter'[116] before setting out the justification framework under Article 52(1) CFR.[117] Similarly, the ECJ in *Fries* reframed the question referred as asking 'in essence, whether [secondary Union law] is valid in the light of… Article 21(1) of the Charter'.[118] At the justification stage, the ECJ then referred to how that Union law was 'nevertheless compatible with Article 21(1) of the Charter in that it satisfies the criteria set out in Article 52(1) thereof.'[119]

In assessing the compatibility of national measures with EU fundamental rights, the ECJ is similarly clear that the Charter provides the governing standard. In *Léger*, the ECJ starts by examining whether the situation falls within the scope of application of the Charter[120] before explaining how the national measure must respect Article 21(1) CFR.[121] Referring to the horizontal effect of the Charter in *Egenberger*, the ECJ concluded that the national court must 'ensure within its jurisdiction the judicial protection for individuals flowing from [Article 21(1) CFR]'.[122]

Although the ECJ relies on the Charter as the primary reference point in the above cases, it does still refer to the corresponding general principle. In *Glatzel, Léger, Fries* and *Egenberger* the ECJ refers to how Article 21(1) CFR 'enshrines' or 'lays down' a corresponding general principle prohibiting discrimination.[123] In one sense this is simply a status of fact; the general principle pre-existed the Charter right to non-discrimination. This reference could, however, imply a continuing relevance for the general principle alongside the Charter. It is submitted here that in none of these cases does the ECJ

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115 Case C-236/09 *Association belge des Consommateurs Test-Achats and Others* EU:C:2011:100, para. 17.
116 *Glatzel* (n 49), para. 41.
117 *Glatzel* (n 49), para. 42.
118 Case C-190/16 *Fries* EU:C:2017:513, para. 27.
119 *Fries* (n 118), para. 35.
120 *Léger* (n 49), paras 46-47.
121 *Leger* (n 49), para. 48.
122 *Egenberger* (n 6), para. 79.
123 *Glatzel* (n 49), para. 43; *Léger* (n 49), para. 48; Case C-406/15 *Milkova* EU:C:2017:198, para. 55; *Fries* (n 118), para. 29; *Egenberger* (n 6), para. 76.

apply the general principle as a distinct source of the prohibition on status discrimination. Consistent with the notion of the Charter as a *lex superior*, the ECJ relies on previous case law relating to the general principle simply to inform the standard of protection under Article 21(1) CFR.

In *Glatzel*, for example, the referring court questioned the validity of secondary Union law setting out the minimum visual acuity to be able to drive certain vehicles. When assessing the compatibility of the contested directive with the prohibition of discrimination on grounds of disability, the ECJ applied the justification framework found in Article 52(1) CFR. To assess whether the contested directive aimed to 'genuinely meet objectives of general interest' (as required by Article 52(1) CFR), the ECJ noted how it had previously held:

> … as regards the general principle of equal treatment in the context of grounds such as age or sex, that a difference of treatment which is based on a characteristic related to such grounds does not constitute discrimination … where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.[124]

The ECJ then reasoned '[i]n the same vein' that differences in treatment on grounds of eyesight are not 'contrary to the prohibition on discrimination based on disability within the meaning of Article 21(1) of the Charter'.[125] The ECJ's approach prioritises the Charter but uses earlier case law to inform the meaning of Article 21(1) CFR.

The ECJ draws on past case law in a similar manner in *Test-Achats* and *Fries*. In the former decision, the ECJ referred to earlier case law on the general principle of equal treatment to inform the meaning of discrimination under the Charter itself. The ECJ cited 'consistent' case law 'that the principle of equal treatment requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified'.[126] Similarly, in *Fries* the ECJ drew from earlier decisions on the principle of equality and the requirement of

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[124] *Glatzel* (n 49), para. 49.
[125] *Glatzel* (n 49), para. 50.
[126] *Test-Achats* (n 115), para. 28. The ECJ also cited earlier case law on what is a comparable situation, see *Test-Achats* (n 115), para. 29.

comparability[127] to determine the meaning of 'discrimination' under the Charter. Most recently, in *Egenberger,* the general principle prohibiting discrimination on grounds of religion or belief is relied upon to establish the horizontal direct effect of Article 21(1) CFR. The ECJ notes how:

> The prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law.[128]

The ECJ then cites the earlier case of *AMS* in support, in which it stated that 'the principle of non-discrimination on grounds of age at issue in that case, laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such.'[129] The general principle does not apply, nor does it limit the Charter. Instead it simply informs the interpretation to be given to Article 21(1) CFR.

Referring to earlier case law in these cases does not imply that general principles might continue to apply alongside Article 21(1) CFR. Instead previous case law helps to establish a base level of protection under the Charter. This fits with the nature of the Charter as 'reaffirm[ing] rights as they result, in particular, from … case-law'.[130] Where the question facing the ECJ has not been the subject of prior judicial consideration, the overlapping general principle is unlikely to be of much assistance. The unwritten nature of general principles means that they are somewhat ephemeral until they are concretised in case law. Indeed, *Léger* highlights the impracticalities of interpreting general principles as determining the limits of Article 21(1) CFR and perhaps explains why general principles are not included in Article 52 CFR as one of the relevant sources to guide the interpretation of the Charter. The case concerned the legality of restrictions on giving blood for men who have had sex with men,[131] which the ECJ had not previously discussed. As such, the ECJ could not draw upon existing case law.

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[127] *Fries* (n 118), para. 30.
[128] *Egenberger* (n 6), para. 76.
[129] *Association de médiation sociale* (n 52), para. 47.
[130] Preamble, Recital 5.
[131] *Léger* (n 49), para. 51.

Only in one case, *Milkova*, is the ECJ more equivocal on the role of overlapping general principles and at some points in the judgment the ECJ comes close to suggesting the dual application of general principles alongside overlapping Charter rights. The case concerned the interpretation of Directive 2000/78 and whether it precluded national measures designed to enhance the protection of disabled workers. In establishing whether the national rules in question were compatible with the prohibition on discrimination on grounds of disability, the ECJ's decision started by recognising that the national measure 'falls within the implementation of EU law within the meaning of Article 51(1) [CFR]'.[132] The ECJ then switched to discussing general principles, noting that 'Member States must exercise their discretion [when implementing EU law] in accordance with general principles of EU law'[133] and that 'the national legislation applicable to the main proceedings falls within the implementation of EU law, which means that, in the present case, the general principles of EU law, including the principle of equal treatment, and of the Charter are applicable'.[134] In referring to general principles in this way, the ECJ suggests that general principles prohibiting discrimination persist as an 'autonomous system of protection'.[135] The ECJ interpreted the Charter and general principles as reaching the same conclusion here and so an additional role for general principles did not come up.

The ECJ's decision in *Milkova* highlights the need for clear articulation of the inter-relationship between Article 21(1) CFR and overlapping general principles. If two separate regimes were thought to exist – one under the Charter and another under the overlapping general principle(s) and each with 'slightly different contours and characteristics'[136] – this would detract from the Charter as the primary repository of fundamental rights protection in the EU. What is more, continuing to apply general principles – which are by nature unwritten and somewhat more contentious[137] – could (as noted above) contradict the stated aim behind the Charter to make the 'overriding

[132] *Milkova* (n 123), para. 50.
[133] *Milkova* (n 123), para. 53.
[134] *Milkova* (n 123), para. 54.
[135] N Lazzerini, 'The Scope of the Protection of Fundamental Rights under the EU Charter' (PhD thesis, European University Institute 2013) 76. See also Iglesias Sánchez (n 81) 1597.
[136] P Oliver, 'Case Comment on *DEB*' (2011) 48(6) *CMLRev* 2023, 2037.
[137] Bell (n 92) 628.

importance and relevance [of fundamental rights] more visible to the Union's citizens'.[138]

In addition, should national judges misinterpret the ECJ's continued reference to general principles alongside overlapping Chapter rights, this could engender considerable legal uncertainty particularly for private actors who would be required to comply with the nuances of both regimes.[139] Treating the Charter as a *lex superior* instead provides an easily accessible frame of reference for private individuals. As Gabinaud argues, '[i]t is easier for individuals to know which provision applies to them when these norms are laid down in written provisions'.[140] If general principles continue to apply residually, private actors also have to be aware that an overlapping general principle might exist, might apply horizontally, might be applied residually, and might lead to a different result.[141] It is almost impossible for private actors gain this knowledge.[142] Indeed, this was the concern motivating the Danish Supreme Court when it refused to apply the general principle prohibiting discrimination on grounds of age horizontally.[143] The Danish Supreme Court had referred a question to the ECJ asking if it could balance the general principle prohibiting discrimination on grounds of age 'and the issue of its direct effect against the principle of legal certainty and the related principle of the

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138 Presidency Conclusions of the Cologne European Council on June 4 1999, Annex IV.
139 As discussed in Chapter 2, the principle of legal certainty is a general principle of EU law, see Case 98/78 *Racke* EU:C:1979:14, para. 20.
140 A Gabinaud, 'Case Comment on *Kücükdeveci*' (2011) 18(1-2) *MJ* 189, 197.
141 On the implications of the horizontal effect of general principles for legal certainty and legitimate expectations, see, F Fontanelli, 'General Principles of the EU and a Glimpse of Solidarity in the Aftermath of *Mangold* and *Kücükdeveci*' (2011) 17(2) *European Public Law* 225, 234; E Gualco and L Lourenço, '"Clash of Titans". General Principles of EU Law: Balancing and Horizontal Direct Effect' (2016) 1(2) *European Papers* 643, 650
142 *Dominguez*, Opinion of AG Trstenjak, para. 164.
143 For the decision of the Danish Supreme Court, see Case 15/2014 *DI, acting on behalf of Ajos A/S v. Estate of A*. English translation available at: <www.supremecourt.dk/supremecourt/nyheder/pressemeddelelser/Documents/Judgment%2015-2014.pdf> accessed 14 August 2018. See further E Gualco, '"Clash of Titans 2.0". From Conflicting EU General Principles to Conflicting Jurisdictional Authorities: The Court of Justice and the Danish Supreme Court in the Dansk Industri Case' [2017] *European Forum* 1; S Haket, 'The Danish Supreme Court's *Ajos* judgment (Dansk Industri): Rejecting a Consistent Interpretation and Challenging the Effect of a General Principle of EU Law in the Danish Legal Order' (2017) 10(1) *Review of European Administrative Law* 135; R Nielsen and CD Tvarnø, 'Danish Supreme Court Infringes the EU Treaties by its Ruling in the Ajos Case' [2017] 2 *Europaraettslig Tidskrift* 303; U Šadl and S Mair, 'Mutual Disempowerment: Case C-441/14 D*ansk Industri, acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen* and Case no. 15/2014 *Dansk Industri (DI) acting for Ajos A/S v The estate left by A*' (2017) 13(2) *EuConst* 347.

protection of legitimate expectations and to conclude on that basis that the principle of legal certainty must take precedence'.[144]

To conclude this Section, nearly all ECJ case law on the overlap between Article 21(1) CFR and general principles of Union law coheres with the idea of the Charter as a *lex superior*. The ECJ does still refer to the overlapping general principle, but this is usually just to inform the standard of protection under the Charter. Only in *Milkova* is the ECJ's decision more ambiguous on the continuing role of overlapping general principles. As noted above, a clear statement from the ECJ on this point would remove any lingering 'confusion'[145] over the role of general principles that may otherwise 'ultimately weaken the overall EU system of fundamental rights protection'.[146]

5. ARTICLE 6(3) TEU AND THE RECOGNITION OF NEW GENERAL PRINCIPLES

Discussion now turns to examine how the ECJ interprets the inter-relationship between Article 21(1) CFR and overlapping general principles when discrimination in alleged on a ground not listed in Article 21(1) CFR.[147] To recap, Article 21(1) CFR prohibits:

> Any discrimination based on any ground *such as* sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.

One can envisage allegations of discrimination on additional grounds. Examples include 'physiological conditions such as appearance or size, psychological characteristics such as temperament or character, or social factors such as class or status'.[148]

Section 3 highlighted a conceivable tension between the idea that Article 21(1) CFR is a *lex superior* compared to general principles prohibiting status discrimination and Article

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144 *DI* (n 50), para. 20. The ECJ held that the principles of legal certainty and legitimate expectations could not alter the obligation to either interpret national law consistently with Union law or otherwise to disapply inconsistent national law (para. 43).
145 Oliver (n 136) 2037. Similarly, de Mol argues it may lead to a lack of coherence, see M de Mol, 'Dominguez: A Deafening Silence' (2012) 8(2) *EuConst* 280, 296.
146 N Lazzerini, 'The Scope of the Protection of Fundamental Rights under the EU Charter' (PhD thesis, European University Institute 2013) 76.
147 The related question of whether EU law permits the recognition of a new general principle prohibiting discrimination on ground expressly listed in Article 21(1) CFR (e.g. colour, genetic features, property) is not addressed here.
148 Case C-354/13 *FOA* EU:C:2014:2106, Opinion of AG Jääskinen, para. 17

6(3) TEU, which reaffirms the recognition of rights not included within the Charter as general principles of Union law. The key question is whether Article 21(1) CFR determines *exhaustively* the grounds of discrimination prohibited by Union law. Or, can the ECJ recognise new general principles prohibiting further grounds of discrimination where these cannot be brought within Article 21(1) CFR? Discussion here is limited to the development of general principles prohibiting discrimination and does not dismiss the possibility that new rights might emerge in other areas.

Only one post-Lisbon case concerns allegations of discrimination on a ground not listed in Article 21(1) CFR:[149] *FOA.*[150] The applicant in *FOA,* Mr Kaltoft, challenged his dismissal by a Danish local authority where he worked as a childminder. His employer claimed that his dismissal was due to a reduction in the number of children requiring care[151] whereas Mr Kaltoft alleged that he was dismissed on grounds of his obesity.[152] The Danish court referred a question to the ECJ asking whether 'there is an EU prohibition of discrimination on grounds of obesity'.[153] Obesity is not found in Article 21(1) CFR's indicative list of prohibited grounds of discrimination, nor had the ECJ previously recognised such a general principle.

The ECJ's approach here is inconsistent with the idea that the Charter is a *lex superior*. To begin with, the ECJ examined 'whether EU law must be interpreted as laying down a

[149] Pre-Lisbon, several cases arose in which the ECJ was asked about the existence of general principles prohibiting discrimination on grounds other than those set out in Article 19 TFEU. See e.g. Case C-13/05 *Chacón Navas* EU:C:2006:456 (regarding the existence of a general principle prohibiting discrimination of grounds of sickness; Case C-101/08 *Audiolux* EU:C:2009:626 (regarding the existence of a general principle of equality between shareholders).

[150] *FOA* (n 8). Questions relating to discrimination on grounds of obesity were raised in *Ruiz Conejero* (n 109). However, the ECJ did not reconsider whether the prohibition on discrimination on grounds of obesity is a general principle or precluded by Article 21(1) CFR. For discussion of other aspects of *FOA,* see e.g. J Damamme, 'How Can Obesity Fit Within the Legal Concept of Disability?' (2015) 8(1) *EJLS* 147; L Waddington, 'Saying all the Right Things and Still Getting It Wrong:: The Court of Justice's Definition of Disability and Non-Discrimination Law' 22(4) *MJ* 576; DL Hosking, 'Fat Rights Claim Rebuffed: *Kaltoft v Municipality of Billund*' (2015) 44(3) *ILJ* 460; G de Beco, 'Is Obesity a Disability: The Definition of Disability by the Court of Justice of the European Union and Its Consequences for the Application of EU Anti-Discrimination Law' (2016) 22(2) *Columbia Journal European Law* 381; A Bourbon, 'Will Expanding the Definition of Disability to Include Obesity Lead to an Expanding Waistline in Europe' (2016) 24(2) *Tulane Journal of International and Comparative Law* 351.

[151] *FOA* (n 8), paras 25, 28.

[152] *FOA* (n 8), para. 29. At the time of his dismissal Mr Kaltoft was obese according to the World Health Organisation's definition (para. 18).

[153] *FOA* (n 8), para. 30.

general principle of non-discrimination on grounds of obesity'.[154] The ECJ reached a negative conclusion on the basis, first, of the EU's competences and, second, by referring to secondary Union law. On the EU's competences, the ECJ noted how 'no provision of the TEU or TFEU prohibits discrimination on grounds of obesity as such.'[155] Specifically, the ECJ singled out how 'in particular' neither Article 10 TFEU (according to which '[i]n defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation') nor Article 19 TFEU (providing a legislative basis for the Council 'appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation') refer to obesity.[156] Turning to Article 19 TFEU, the ECJ recapped how that provision 'contains only the rules governing the competencies of the EU and that, since it does not refer to discrimination on grounds of obesity as such, it cannot constitute a legal basis for measures of the Council of the European Union to combat such discrimination.'[157]

Quite why the ECJ examined the existence of legislative competences or existing primary law provisions is unclear and is contrary to the supposedly inspirational sources of general principles i.e. the ECHR and constitutional traditions common to the Member States.[158] Additionally, the ECJ justified the conclusion that no general principle exists by referencing EU secondary law prohibiting status discrimination. The ECJ noted how the anti-discrimination directives do not 'lay down a general principle of non-discrimination on grounds of obesity as regards employment and occupation.'[159] The ECJ held that 'the scope of Directive 2000/78 should not be extended by analogy beyond the discrimination based on the grounds listed exhaustively in Article 1 thereof'[160] and so, in conclusion, 'obesity cannot as such be regarded as a ground in addition to those in relation to which Directive 2000/78 prohibits discrimination'.[161]

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[154] *FOA* (n 8), para. 31.
[155] *FOA* (n 8), para. 33.
[156] *FOA* (n 8), para. 33.
[157] *FOA* (n 8), para. 33.
[158] Article 6(3) TEU. See also n 30 above and the references cited therein.
[159] *FOA* (n 8), para. 35.
[160] *FOA* (n 8), para. 36.
[161] *FOA* (n 8), para. 37.

Significantly, only after reaching a negative conclusion on the existence of a general principle[162] did the ECJ examine the potential applicability of the Charter. Had the ECJ understood Article 21(1) CFR as a *lex superior* here, the analysis carried out above – i.e. assessing whether a prohibition on obesity discrimination is prohibited as a general principle – could have been carried out in relation to the Charter. Specifically, the ECJ could have assessed whether Article 21(1) CFR, which is worded in a non-exhaustive manner, can be interpreted as prohibiting obesity discrimination. Relevant here are the horizontal provisions in the Charter, specifically Articles 52(2)-(4) CFR, which set out interpretative guidelines for establishing the meaning of Charter rights. Instead, the ECJ simply noted that there is 'nothing to suggest that the situation at issue in the main proceedings, in so far as it relates to a dismissal purportedly based on obesity as such, would fall within the scope of EU law',[163] leading the Court to rule that 'the provisions of the Charter of Fundamental Rights of the European Union are likewise inapplicable in such a situation'.[164]

It is difficult to identify precisely what principle determines the relationship between the Charter and general principles in *FOA*. By concentrating on whether a general principle exists and stating without any further analysis why the Charter did not apply, the ECJ implies that Article 21(1) CFR does not limit the grounds of discrimination prohibited by Union law. Advocate General Jääskinen – the Advocate General in *FOA* – offers one potential explanation for the ECJ's approach in both his Opinion in *FOA* and in academic writing.[165] He argues that interpreting Article 21(1) CFR to cover obesity discrimination was not a possibility open to the ECJ and would be 'blocked by the rules that are relevant to the material scope of the EU Charter'.[166] On this view, a potential gap arises in the protections offered by the Charter making recourse to general principles permissible by virtue of Article 6(3) TEU (as noted above, the aims behind Article 6(3) TEU were to ensure that the Charter did not prevent the development of new rights). In support of this view, he cites the following provisions:(1) Article 6(1)

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162 *FOA* (n 8), para. 37.
163 *FOA* (n 8), para. 38.
164 *FOA* (n 8), para. 39.
165 N Jääskinen, 'Discrimination on Grounds of Obesity' in S Vogenauer and S Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart 2017) 355-364, 358. For a very similar, (although somewhat less developed) argument see *FOA,* Opinion of AG Jääskinen (n 148), paras 17-19.
166 Jääskinen (n 165) 358.

TEU, which states that the Charter 'shall not extend in any way the competences of the Union as defined in the Treaties); (2) Article 51(2) CFR, according to which the Charter does not 'establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties'; and (3) the Explanations relating to the Charter which state that Article 21(1) CFR 'does not alter the extent of powers granted under Article 19 [TFEU] nor the interpretation given to that Article'. According to the Advocate General, '[t]hese provisions set out an outer-boundary of EU fundamental rights law that is pertinent [in *FOA*]'.[167]

Where Advocate General Jääskinen's argument struggles, however, is in the assumption that the recognition that Article 21(1) CFR prohibits obesity discrimination would amount to a new 'competence', 'power' or 'task' for the EU. Following the Advocate General's reasoning to its logical conclusion suggests a very narrow reading of Articles 6(1) TEU and 51(2) CFR. If those provisions prevent the expansion of the Charter so that additional grounds of discrimination are prohibited on the basis that this would expand the competences and powers of the EU, surely it also implies that any of the grounds of discrimination listed in the Charter which are not found in Article 19 TFEU (i.e. colour, ethnic or social origin, genetic features, language, political or any other opinion, membership of a national minority, property, birth) also cannot be relied upon since this would be tantamount to expanding the competences or powers of the EU? The effect would be to render those grounds of discrimination prohibited by the Charter but not prohibited elsewhere in EU law as purely political or aspirational.

The existing interpretation of Articles 6(1) TEU and 51(2) CFR suggests that Article 51(2) CFR is not understood in this manner by the ECJ. The few cases citing Article 51(2) CFR have employed that provision in conjunction with Article 51(1) CFR on the scope of application of the Charter. In *McB*, for example, the ECJ referred to how:

> … according to Article 51(1) of the Charter, its provisions are addressed to the Member States only when they are implementing European Union law. Under Article 51(2), the Charter does not extend the field of application of European Union law beyond the powers of the Union, and it does not "establish any new

[167] *FOA,* Opinion of AG Jääskinen (n 148), para. 19.

> power or task for the Union, or modify powers and tasks as defined in the Treaties".[168]

In consequence, the Charter could only be relied upon 'the Charter should be taken into consideration solely for the purposes of interpreting [EU secondary law]'[169] and not national law. Articles 51(1) and 51(2) CFR were, thus, instrumental in restricting the *application* of the Charter but not the rights protected under it.

Even if the Advocate General were correct in his conclusion that Articles 6(1) TEU and 51(2) CFR block the interpretation of Article 21(1) CFR as prohibiting additional grounds of discrimination, he does not explain why recourse to general principles is appropriate instead. Article 51(2) CFR codifies earlier ECJ case law relating to general principles. As the Explanations relating to the Charter clarify, Article 51(2) CFR 'confirms that the Charter may not have the effect of extending the field of application of Union law beyond the powers of the Union as established in the Treaties.'[170] The Explanations attribute the origins of this rule to the decision in *Grant*. In that case, the ECJ declined to reinterpret Article 157 TFEU on equal pay as prohibiting – not only discrimination on grounds of sex – but also discrimination on grounds of sexual orientation. Underpinning this decision was the conclusion that:

> …although respect for the fundamental rights which form an integral part of those general principles of law is a condition of the legality of Community acts, those rights cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competences of the Community.[171]

Similarly, the lack of a corresponding EU competence was instrumental in the ECJ's conclusion that no general principle prohibiting obesity discrimination exists.

Attempts to rationalise the decision in *FOA* on the grounds that Article 21(1) CFR is somehow subject to limitations that do not also apply to general principles prohibiting discrimination are, therefore, unpersuasive. Were Article 21(1) CFR treated as a *lex superior* here, the expectation is that the ECJ would start by clarifying why Article 21(1) CFR does not apply. Instead, the ECJ starts its analysis by considering if a general principle exists without first offering explaining why a general principle prohibiting

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[168] Case C-400/10 PPU *McB* EU:C:2010:582, para. 51.
[169] *McB* (n 168), para. 52.
[170] Explanations (n 43) 32.
[171] Case C-249/96 *Grant* EU:C:1998:63, para. 45.

obesity discrimination might exist, but obesity discrimination cannot be encompassed within the non-exhaustive wording of Article 21(1) CFR. Admittedly, this is only one case, but ECJ practice does not cohere with the notion of the Charter as a *lex superior* when it comes to the recognition of additional prohibited grounds of discrimination.

6. CONCLUSION

This Chapter assessed how the ECJ resolves the inter-relationship between Article 21(1) CFR and overlapping general principles prohibiting discrimination. The Chapter started in Section 2 by setting out the development of EU fundamental rights and, specifically, the adoption of the Charter to codify EU fundamental rights protected as general principles of Union law. As a result, the protection offered by each source – Article 21(1) CFR and general principles prohibiting discrimination – is very similar, even if the wording of the Charter suggested greater divergences. Given the existence of two – highly alike – overlapping sources of the prohibition on status discrimination, this Chapter turned to investigate how the ECJ determines their inter-relationship.

As a baseline against which to compare ECJ practice, Section 3 examined whether any of the horizontal provisions in the Charter might operate as a priority clause and whether any of the priority principles set out in Chapter 2 might aid the ECJ here. It was concluded, in relation to priority clauses, that only Article 6(3) TEU offers any guidance to the ECJ concerning interactions between the Charter and overlapping general principles. Article 6(3) TEU only refers, however, to the permissible development of new general principles that extend beyond those enumerate by the Charter. In relation to the possible application of any priority principles, Section 3 highlighted that it is in one sense difficult to identify an appropriate starting point due to the unwritten nature of general principles. It was argued, however, that Article 21(1) CFR should be understood as a *lex superior* in relation to general principles and should – as regards grounds of discrimination prohibited under each – replace overlapping general principles.

Sections 4 and 5 then went on to assess ECJ practice against this baseline. The main finding here was that, where discrimination is alleged on a ground listed in Article 21(1) CFR, the ECJ usually applies only Article 21(1) CFR. The ECJ continues to refer to pre-

existing jurisprudence on general principles, but this is largely only to determine the meaning of the Charter right. Indeed, the aims behind the Charter to strengthen and make more visible EU fundamental rights requires – at least – a parity in the level of protection pre- and post-Charter. Only in one case, *Milkova,* is the ECJ more ambiguous about the continued role of general principles.

Where discrimination is alleged on a ground not listed in Article 21(1) CFR, ECJ practice does not cohere with the notion of the Charter as a *lex superior*. In *FOA,* establishing whether Article 21(1) CFR could extend to prohibit obesity discrimination is only an afterthought. The ECJ starts by considering the existence of a general principle without first explaining why Article 21(1) CFR could not apply. This approach – even if one accepts a continued role for general principles as enshrining new fundamental rights not enumerated in the Charter – obfuscates the constitutional significance of the Charter as a bill of rights for the EU. As Tridimas reminds us:

> … the primary point of reference for the protection of fundamental rights should be the Charter. This is in keeping with the intentions of the Treaty authors, which granted the Charter the same value as that of the Treaties, and also the objectives of the Charter as a document which defines the values of the EU polity.[172]

The risk is that the ECJ's approach undermines the status of the Charter as the main source of fundamental rights for the EU.

In many ways, the ECJ's reasoning in *FOA* shows how the inter-relationship between general principles of Union law and overlapping written sources remains somewhat contested. The ECJ's search for new general principles in the Treaties and secondary Union law is not only *contra legem* the express wording of Article 6(3) TEU, but it also indicates a wider reluctance to place the Charter at the centre of cases involving fundamental rights around the Charter. The ECJ is perhaps keen to retain the greater room for manoeuvre for which general principles allow. As seen also in Chapter 5, it is often in hard cases that the ECJ departs from existing principles of interpretation. However, the conclusion reached in this Chapter is that treating the Charter as a *lex superior* and articulating this point more clearly will have wider benefits for the overall system of rights protection in the EU. Relying on the Charter forces the ECJ to be more

[172] Tridimas, 'Fundamental rights, general principles of EU law, and the Charter' (n 81) 377.

transparent in its reasoning, which is highly significant given the liability of fundamental rights to affect the vertical and horizontal allocation of powers in the EU.

Conclusion

This thesis examined how the ECJ interprets the inter-relationship between overlapping norms of Union law. Through a series of case studies, this thesis assessed the role played by classical principles of norm inter-relationship – respect for express clauses and the principles of *lex superior*, *lex posterior* and *lex specialis* – in ECJ case law. The initial rationale for carrying out this assessment (i.e. comparing the ECJ's approach to norm inter-relationship against the approach suggested by existing priority clauses and priority principles) was to show the limited utility of existing approaches in the context of norm overlap. In turn, identifying where existing principles fell short was supposed to pave the way for the development of new guiding principles addressed to the ECJ. Instead, with each case study came the conclusions: first, that the ECJ's approach to norm inter-relationship in fact usually followed the guidance offered by existing principles, although without expressly saying so; and, secondly, that the problem cases were those in which the ECJ departed from existing principles.

In many ways, this thesis offers an old solution to a new problem. Existing scholarship mentions distinct overlaps arising in different areas of Union law, but only in a piecemeal manner. This thesis built on these discrete observations to develop the concept of norm overlap, which raises difficult questions for the ECJ. By drawing attention to the existence of norm overlap and the *prima facie* applicability of multiple norms prohibiting discrimination in certain situations, this thesis highlighted a previously un(der-)recognised phenomenon in Union law and showed how norm overlap is a very real issue. The novel problem identified by this thesis is not that norms overlap *per se*, it is instead the lack of clarity about how they should interact and the constitutional weight that hangs upon this determination.

The difficulties that norm overlap creates and the significance of the problem are borne out by each of the different case studies. Chapter 2 demonstrated that how the ECJ approaches the inter-relationship between overlapping norms can have wide-ranging constitutional implications, which extend beyond the outcome of an individual case. The doctrinal analysis carried out for this thesis shows how the ECJ's interpretative choices can impact upon different constitutional values such as respect for fundamental

rights, the balance of powers between the EU and the Member States, institutional balance, and legal certainty. Each of the substantive Chapters shows that the ECJ does sometimes fall prey to political pressures and that the relationship between overlapping norms is often at the heart of controversial cases.

It is here that classical solutions to norm inter-relationship come in. The conclusion reached in each Chapter is that existing approaches to norm inter-relationship offer workable guidance to the ECJ when faced with overlaps between norms. To frame the solution identified as 'old' is perhaps somewhat misleading. Priority clauses and the principles of *lex superior* and *lex specialis* are well-established methods of resolving norm conflicts in national and international law; however, in the context of both Union law and norm overlap, the potential role these principles could play remains largely untapped. In this way, the thesis fills a gap in the literature by examining how priority clauses and priority principles might apply in the EU legal order.

Existing approaches do not always translate perfectly to the EU context or to the context of norm overlap. Chapter 3 showed, for example, that the *lex superior* principle is too blunt a tool to determine the inter-relationship between overlapping primary and secondary Union law and should be subsumed, in part, by legality review. The *lex superior* principle instead operates best in the context of the EU legal order as a systemic principle ensuring the interpretation of secondary Union law in line with the Treaties. Chapter 5 also cast doubt on the relevance of the *lex posterior* principle for Union law. What each of the case studies shows, though, is that respect for priority clauses and priority principles – with some modifications – maintains a balance between competing constitutional values. If the ECJ were to articulate its conventional method more clearly and consistently follow the legal principles that underpin it, it would avoid the pull in hard cases – such as *Barber, Hendrix* and *Brey* – to try and achieve a certain outcome. In doing so this leaves the appropriate space for other actors, particularly the Union legislature, to resolve persisting problems within the legal framework. It should also lead to greater legal certainty as to the outcome in individual cases.

The conclusions reached by this thesis are, therefore, dependent on a shift in reasoning by the ECJ. At present, the ECJ does not recognise the existence of norm overlap or

employ the language of established guiding principles. Thus even though ECJ practice often coheres with existing approaches to norm inter-relationship, it does not acknowledge the relevance of priority clauses and priority principles in its decisions. It would also be wrong to imply that relying on priority clauses and priority principles will always offer an easy solution. There are often tricky questions surrounding, for example, which norm is more specialised and when one norm will 'prejudice' or 'affect' the conclusions reached under another.

In many ways, this thesis only scratches at the surface of the problem of norm overlap and the role of priority clauses and priority principles in determining questions of norm inter-relationship. The sheer number of overlaps in the field of non-discrimination alone precluded a detailed examination of the ECJ's approach in other instances of norm overlap identified. Furthermore, the mediating role that priority principles do and should play warrants further exploration. For instance, it is unclear if the *lex posterior* principle has any role to play in EU law. However, focusing on norm inter-relationship draws our attention to the justification for competing choices and throws new light on ECJ decisions that have previously been much-discussed from different perspectives.

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Lay Summary

This thesis centres on the following core question: where one legal provision replicates – at least to some extent – the content of an existing provision, which should apply in a particular case? To exemplify the problem, envisage two different rules each prohibiting discrimination on grounds of sex; however, one provision allows employers to discriminate against female employers where 'necessary' in the interests of the business. When a woman alleges unfair dismissal on account of her gender, which provision does and should apply? If a court prioritises the provision allowing for discrimination in certain circumstances, this may alter the outcome of the case.

In this thesis, I show how the replication of legal rules (what I term 'norm overlap') is a recurring phenomenon in European Union (EU) law that has gone largely unnoticed by legal scholars. This thesis explains the reasons for the development of overlapping provisions of EU law and shows why overlap between provisions presents the European Court of Justice (ECJ) with difficult interpretative choices.

Though a series of linked case studies, each dealing with different aspects of the prohibition on discrimination, I examine how the ECJ approaches the question outlined above i.e. which provision, where there are two or more similar provisions, should apply in a particular case? Extensive research leads to the conclusion that there already exists a series of guiding principles that the ECJ follows when faced with this question, although, the ECJ does not explicitly refer to these principles and sometimes departs from this approach without explanation. This thesis argues, first, for a clearer articulation of the principles applied by the in practice and, secondly, for the ECJ to follow this approach consistently due to the serious constitutional consequences that follow when the ECJ departs from its usual practice.